Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

GRAEME FREEMAN, et al.,
Petitioners,

v.

BURLINGTON BROADCASTERS, INC.,
dba WIZN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GERALD R. TARRANT *
TARRANT, MARKS & GILLIES
P.O. BOX 1440
MONTPELIER, VERMONT 05601-1440
(802) 223-1112

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Is local zoning preempted by the Federal Communications Act and regulations promulgated by the Federal Communications Commission when radio or telecommunications facilities cause interference with local electrical and electronic devices used by local businesses and institutional services?

PARTIES TO THE PROCEEDING

Petitioners

Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, William Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, Barbara Sanford Farrell, and William Pinney, Sr. Petitioners are individuals and have no corporate affiliations.

Respondents

Burlington Broadcasters, Inc. dba WIZN, Charlotte Fire & Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 204 F3d 311 (2d Cir. 2000). A copy of the Opinion is included as Appendix A. The Opinion of the District Court for the District of Vermont is reported at 975 F.Supp. 570 (D. Vt. 1997) and is included as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its Opinion on February 23, 2000. This Petition for Writ of Certiorari is filed within ninety-days of that Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution.

The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Federal Communications Act of 1934, as amended, 47 U.S.C. § 302a provides in relevant part (emphasis added):

> (a) The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations
> (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and,
> (2) establishing minimum performance standards for home electronic equipment and standards to reduce their susceptibility to interference from radio frequency energy.

In addition, there are specific federal statutes granting the FCC precise authority to regulate interference among licensed radio stations, radio operators, government stations and ships at sea. *See e.g.* 47 U.S.C. §§ 301, 303(f), 303(m)(1)(E), 306, 320-1, 323 and 354 (b) and (c). Under settled precedent of this Court, where Congress has included explicit authorizing language in one section of a statute, but omits similar language relative to other aspects of business, it is presumed Congress acted intentionally and purposely. Preemption is not favored.

STATEMENT OF THE CASE

I. Procedural Case History

a. The Permit in 1987.

This case arises out of various local permitting decisions first denying and then allowing the construction and location of a telecommunications tower owned by Charlotte Volunteer Fire & Rescue Service (CVFRS) and used by CVFRS and Burlington Broadcasters, Inc. d/b/a WIZN (WIZN), and more recently by NYNEX MOBILE LIMITED PARTNERSHIP 1, d/b/a Bell Atlantic NYNEX Mobile (BANM).

In 1986 the local zoning authority denied the co-application by WIZN and CVFRS to construct a telecommunications tower on Pease Mountain in the town of Charlotte, Vermont on the grounds that it was not located in the commercial zone. The co-applicants reapplied and represented that they corrected the earlier problem by re-locating the tower consistent with zoning requirements. Concerns were raised whether the tower would cause radio frequency interference (RFI) where the tower was proposed to be located. A representative of the co-applicants stated that there would be no interference and if there were they "would trap it out." Appendix K at page 113a. This became a condition of the zoning permit issued January 7, 1987. Appendix L at page 116a. By virtue of the failure to appeal this permit, this became a final, binding condition.

b. Interference and Investigation by Zoning Administrator.

Interference began almost immediately after WIZN went on the air in 1987. Complaints were made directly to WIZN but few of the complaints were adequately addressed. After the complaints of people in town were not addressed, several residents filed a complaint with the local zoning administrator. After investigating the complaint, the Charlotte Zoning Administrator issued a notice of zoning violation on April 5, 1996 against CVFRS, the owner of the tower. The notice of violation cited CVFRS, WIZN and BANM for operating and/or permitting the operation of a broadcast facility that "has caused long term and continuous [radio frequency] interference ("RFI") with electrical devices in homes and businesses throughout the town." Appendix I at page 104a.

c. Appeal to Zoning Board of Adjustment.

CVRFS, WIZN and BANM filed a timely appeal of the zoning administrator's decision with the Charlotte Zoning Board of Adjustment (ZBA). Vt. Stat. Ann. Tit. 24 § 4464(a) (Supp. 1996). The Petitioners made their appearance as parties to support the zoning administrator's decision. Vt. Stat. Ann. Tit. 24 § 4464(b) (Supp. 1996).

After a public hearing, the ZBA on July 11, 1996 ruled "that WIZN has caused continuous and widespread [radio frequency interference] that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property." Appendix H at page 97a. Nevertheless, the ZBA dismissed the notice of violation because it found that Congress intended to maintain federal jurisdiction over RFI

phenomena and that the ZBA was without authority to regulate such interference. *Id.* at page 100a.

d. Appeal to Vermont Environmental Court and Removal to Federal District Court.

On August 8, 1996, the Petitioners filed a Notice of Appeal of the ZBA decision to the Vermont Environmental Court. Vt. Stat. Ann. Tit. 24 § 4470 (Supp. 1996). On September 6, 1996, BANM and WIZN filed a Notice of Removal with the United States District Court for the District of Vermont claiming the district courts had original jurisdiction founded on a claim arising under the Federal Communications Act of 1934 (as amended), 47 U.S.C. § 151 *et seq.*

WIZN then filed a motion to dismiss with the U. S. District Court pursuant to Fed.R.Civ.P. 12(b)(6) and BANM filed a similar motion pursuant to Fed.R.Civ.P. 12 (b)(1) and 12(b)(6). Both motions essentially claimed that the Federal Communications Act preempts the Petitioners' zoning appeal. CVFRS joined in both motions. After briefing and oral argument, the District Court granted BANM's motion to dismiss on the grounds of subject matter jurisdiction. WIZN's Motion to Dismiss was denied as moot.

e. Appeal to Second Circuit Court of Appeals.

The Petitioners appealed to the United States Court of Appeals for the Second Circuit. On February 23, 2000, the Circuit Court modified and affirmed the ruling of the District Court. The Circuit Court held that federal law preempts enforcement of local zoning permit conditions requiring licensees to remedy radio frequency interference. As a procedural matter, the Circuit Court modified the judgment so

that it affirmed the local zoning board's decision on the preemption issue.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION PRESENTED IS IMPORTANT TO THE NATION

Under the guise of federal preemption, the Second Circuit decision deprives local communities of the power to site telecommunication towers under traditional zoning principles which have been consistently upheld by the courts and even the FCC relative to radio frequency radiation. Appendix A. The Second Circuit's decision would deprive local communities of the power to enforce Zoning Ordinances designed to protect the health and safety of their residents. The Second Circuit's decision, if followed throughout the country, will have a significant adverse impact on local communities, small businesses and local institutions such as school districts. The granting of Petitioners' writ would resolve an important question of federal law that affects virtually every community in our country at a time when telecommunication facilities are being sited at a rapid pace.

Under the Second Circuit's decision licensees would be free of any local zoning regulations — even those explicitly accepted as a condition of accepting local permits —that relate to the location of telecommunication towers relative to interference within a community. As a practical matter, this would deprive local residents of any meaningful forum to remedy such interference. (The District Court and Second Circuit directed the Petitioners to the FCC (Appendix D at

page 48a and Appendix A at page 30a.) Such a review would occur in a context in which Congress has explicitly defined exactly the kinds of interference that are preempted, yet allowed to stand state regulation over the type of radio frequency interference at issue in this case.

The issue presented here is one of first impression for this Court, and of significant national importance.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT ON THE RULES OF FEDERAL PREEMPTION AND STATES RIGHTS

The Second Circuit's decision inferring federal preemption cannot be squared with Supreme Court precedent. The Circuit Court found no express preemption of local authority over the regulation of business electronic equipment; it found preemption by inference. Appendix A at page 19a. The Second Circuit made this decision knowing there were specific federal statutes granting the FCC precise authority to regulate radio frequency interference between radio operators and licensees and between ships and licensees. None of these authorities specifically preempt the local zoning regulation at issue in this case. All of these authorities narrowly define specific subjects of preemption, leaving the broader field undisturbed.

A. THE SECOND CIRCUIT'S DECISION WAS INCONSISTENT WITH THE SUPREME COURT'S PREEMPTION STANDARDS.

The Second Circuit ignored the rule of the Supreme Court that where Congress enacted provisions in legislation explicitly defining the preemptive reach of the statute that "matters beyond that reach are not preempted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). The Second Circuit cited the various statutes that directed the FCC to regulate interference in certain instances such as between radio stations and inferred that such authority meant that the FCC had authority over all "technical" issues.[1] Appendix A

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[1] The Circuit Court correctly found that Congress intended to preserve local zoning authority over the placement of personal wireless facilities. Without any authority the Circuit Court then presumed that Congress did not intend to "repeal the FCC's exclusive jurisdiction over RF interference complaints." Appendix A at page 24a. The preservation of local authority can be found within the 1996 Telecommunications Act. Appendix N at pages 120a-121a. It should be emphasized that the FCC's authority over the "environmental effects of radio frequency emissions" relate to the biological effects of RF radiation and only extends "to the extent that such facilities comply with the Commission's regulations concerning emissions." *Id* at page 121a; C*f* Appendix A at pages 28a-29a. In subsequent rulemaking, the FCC explicitly found that its preemptive reach relative to the effects of radio frequency radiation did not extend to broadcasting facilities and other facilities that are not personal wireless facilities. Appendix Y at pages 179a-182a. These matters have always been considered to be within the traditional authority of local zoning authorities. Nevertheless, the Second Circuit found that the FCC's "pervasive" regulation of broadcasting technology supported its conclusion to preempt States and local governments from regulating the siting of antenna and

at pages 18a-19a. The Second Circuit confirmed this inference by deferring to the FCC as the agency which oversees telecommunications. Appendix A at page 20a.

Congress never stated or intended to preempt local zoning decisions over the placement of telecommunications towers except where explicitly stated. *See e.g.* 47 U.S.C. § 332(c). Appendix N at pages 120a-121a. This is shown through the plain meaning of congressional enactments. The 1982 amendments to the Act, for example, demonstrate how the FCC's authority is *limited* to regulations authorizing it to establish minimum performance standards for home electronic equipment, and not business electronic equipment. Should there be any ambiguity or confusion, the Congressional Record explicitly describes how Congress has restricted the FCC's authority to promulgating minimum performance standards for home electronic equipment, as distinguished from any regulation over business electronic equipment.

1. **Preemption Is Not Applicable.**

The Second Circuit purportedly relied upon the standards set forth in the *Cipollone* case to conclude that by inference federal law preempts the regulatory powers of state and local governments over interference affecting business electronic equipment. *Cipollone* recognizes three ways federal law can preempt local law: (1) expressly, as when the federal law says it preempts state or local law on the subject;

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tower support structures based on local interference phenomena. Appendix A at page 24a. While basing its holding on the FCC's "pervasive regulation of broadcasting technology," it found the preservation of local siting authority on the basis of radio frequency emissions to have "no relevance to the issue of RF interference." Appendix A at page 29a.

(2) if the state or local law actually conflicts with federal law; or (3) when federal law so preoccupies a legislative field that no room is left for the states to supplement it. *Id.*, 505 U.S. at 516. The Second Circuit concluded that the third prong of *Cipollone*, "field preemption," applied despite the fact that Congress had directed the FCC to specifically regulate interference in some narrow, precise situations while leaving other local authority intact. It failed to apply the test properly.

2. The Supreme Court Has Held That There Is A Presumption Against Preemption.

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). States may legislate on subjects relating to health, life and safety though the legislation may indirectly affect the commerce of the country.[2] *Head v. New Mexico Board of Examiners In Optometry,* 374 U.S. 424, 428. However, the power of local governments to regulate land use is admittedly not unlimited. *Schad, supra.* "Under the Supremacy Clause of the United States Constitution, where the Congress has enacted a statute which preempts a state or local law, the state or local government is

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[2] Radio frequency radiation and interference are considered to be air pollution under Vermont law. 24 V.S.A. § 4407(7). Appendix CC at page 243a. Except for the limited restrictions imposed under the 1996 Telecommunications Act relating to the effects of environmental emissions from personal wireless facilities "to the extent that such facilities comply with the Commission's regulations concerning such emissions" the local impacts are local issues not regulated by the FCC. Appendix Y at page 181a.

without the authority to act within that area." *See Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, No. 91-614OT, Slip op. at 6 (citing *Securities Industry Association v. Connolly,* 883 F.2d 1114, 1117 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2559 (1990). The general rule, however, is that there is a presumption against federal preemption of state law.

In *Cipollone*, the Supreme Court reaffirmed the presumption against federal preemption of state law. The rule in *Cipollone* is clear: Congress' enactment of provisions in legislation explicitly defining the preemptive reach of the statute means that "matters beyond that reach are not preempted." *Cipollone*, 505 U.S. at 517; also *Keene Co. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. (citation omitted)")

The Second Circuit did not address the presumption against preemption under the Supreme Court's rulings. The Second Circuit failed to address the principles of statutory construction within this context. One cannot infer preemption where Congress has explicitly carved out statutory language that preempts state and local activities in other ways. The Supreme Court's decision in *Cipollone* does not support the Second Circuit's decision.

B. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THE TENTH AMENDMENT.

1. Field Preemption Is Not Applicable Under the Tenth Amendment.

The Second Circuit concluded that the federal law in the present case is governed by field preemption. The Court of Appeals found legislative intent to provide the FCC with exclusive jurisdiction over RFI in the 1982 amendments to 47 U.S.C. § 302a. Appendix A at pages 18a-19a. The Court concluded that the legislative intent of Section 302a was to restrict state or local regulation over all radio frequency interference. In reaching its conclusion, the Court ignored specific language in the legislative history that provides that the FCC's authority to promulgate minimum performance standards applied only to home electronic equipment "as distinguished from devices intended for office and business use." Appendix Q at page 151a.

This is clear error. Federal legislation does not have to authorize state or local regulation; state or local regulation is allowed if federal regulation is silent. "All is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). Surrender occurs through the actions of Congress. The power originally resides with the states, and needs to be taken away by Congress.

> [T]here is no phrase in the [U. S. Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which

> was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly" and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, which the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

McCullough v. State of Maryland, 4 Wheat. 406, 4 L.Ed. 579 (1819).

The Tenth Amendment was enacted to allay fears about the centrality of federal authority and the potential loss of sovereignty by the states. The founders intentionally avoided a system in which the federal government would regulate the states. The founders chose instead to establish a system that regulates individuals directly, rather than to attempt to "federalize" the state (or by necessary implication local governments.) *Printz v. United States* , 521 U.S. 898, 919-920 (1997); accord, *New York v. United States*, 505 U.S. 144, 161-166 (1992) ("In providing for a stronger central government therefore, the framers explicitly choose a Constitution that confers upon Congress the power to regulate individuals, not States."); also *Reno v. Condon*, 120 S.Ct. 666, 671-2 (2000).

Federalism is a system of dual sovereignty. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). As Justice Kennedy wrote, federalism's great invention is that "our citizens would have

two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

In the present case, a federal agency without express statutory authority from Congress, is said to enjoy preemptive powers over the siting of telecommunications facilities by local government, acting under the direct authority of a general enabling law of zoning. The FCC asserts this power even though it has been granted express statutory authority to regulate interference relative to its regulated licensees and between such licensees and other entities that create interference such as ships at sea and government communication facilities. It can point to no statutory authority to regulate interference by telecommunications facilities with local business, institutional and medical equipment. It relies on inference.

We do not doubt that the commerce power authorizes Congress to create private rights as against the States. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). To do so Congress must act. Here it has not done so. By failing to affirmatively act, the parties drop into the safety net of the Tenth Amendment to recognize that the zoning laws of the small Vermont town of Charlotte are the authority that rules this application.

The Second Circuit ignored the Tenth Amendment, although the Constitutional arguments were briefed and argued to the Court.

2. Clear Statement/Plain Meaning Rule Applies.

The clear statement rule applies. The courts read statutory language narrowly when the Commerce Clause is involved to determine whether Congress intended to preempt the states. Laurence H. Tribe, American Constitutional Law (1988), § 58 at pp. 316-317. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass,* 404 U.S. 336, 349 (1971). As Professor Tribe explains the clear statement rule, "Congress must be prevented from resorting to ambiguity as a cloak to accommodate the competing interests bearing on the federal-state balance." *American Constitutional Law, supra,* at § 5-8, page 317. Yet, the Second Circuit inferred preemption where none was to be assumed.

When a statute is clear, there is no need to look beyond the statutory language to divine Congressional intent. *Goodstein v. Bombardier Capital, Inc.,* 889 F. Supp. 760, 765 (1995); *United States v. Am. Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") This is especially true when evaluating a preemption claim since preemption is not presumed. *Cipollone, supra,* 505 U.S. 504, 521-522 (1992).

The question of whether a particular regulatory field has been preempted by Congress turns on the purpose of the federal regulation or statute. In siting a nuclear waste facility, for example, the State of California decided to create a regulatory system to determine whether the location was economically feasible. The utility challenged the California

act on grounds of preemption, and the United States Supreme Court determined that there was authority for the state to act, principally because its concerns were local (in this case, economic), while the concerns of the federal nuclear regulatory authority were principally related to safety, which is appropriately preempted. *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996) ("In a pre-emption case such as this, state law is displaced only 'to the extent that it actually conflicts with federal law,'" citing *Pacific Gas and Electric*, 461 U.S. at 204).

Petitioners in *Pacific Gas and Electric* argued that the siting of nuclear waste facilities was preempted by federal law, but the Supreme Court concluded otherwise. It held that California could say "no" to a developer of a facility without offending the federal interest in ensuring that the nuclear waste facility was safe, because the purposes of the two regulatory approaches (state and federal) did not overlap, in the same way as the Charlotte Zoning Board of Adjustment and the FCC each pursue different objectives. The roles are just reversed in the present case. In our case, the federal law seeks to ensure economic advantages for broadcasters, by seeking to prevent interference of signals between stations competing for the same airspace or through the establishment of home electronic *standards*, while the Charlotte ZBA is responsible for ensuring that all development is *safe*, and appropriate with respect to the local character of the area. The ZBA approves the local siting of the facilities. There is no overlap here; indeed, there are no regulations purporting to cover interference to business equipment by the FCC (and, in fact, limited authority relative to home electronic equipment.)

The FCC recognized in 1996 that its *technical* oversight of the health and safety effects from radio frequency radiation was limited by statute. Appendix Y at pages 179a-182a. Nevertheless, in the present case, the Second Circuit "deferred" to the FCC's position claiming preemptive authority over "technical" issues dealing with radio frequency interference. Appendix A at pages 18a and 20a. The Second Circuit misinterpreted the meaning of the FCC's 1996 decision that it did not preempt state and local authority of radio frequency radiation emitted from broadcasting facilities on the grounds that Congress had only directed it to promulgate rules relative to RFR with respect to personal wireless facilities.

In a preemption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co.*, 461 U.S. at 204. *See English v. General Electric Co.*, 496 U.S. 72, 84 (1990) (citing *Pacific Gas & Elec. Co. supra*, 461 U.S. 190, 212-213 (1983)) (a state tort claim brought by an employee of a nuclear-fuels production facility against her employer was not pre-empted by a federal whistle-blower provision because the state law did not have a "direct and substantial effect" on the federal scheme). The rule is that a "federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Similarly, it should be hesitant to infer federal regulatory authority where none exists.

The Second Circuit failed to address the clear meaning rule or otherwise attempt to apply statutory construction principles to the federal law presented to it.

3. The Plain Meaning Demonstrates the FCC is Without Authority.

The plain meaning and legislative history of section 302(a) of the Communications Act of 1934 (the "Act"), clearly shows that Congress' intent was only to regulate interference to "home electronic equipment" and interference between licensees and other enumerated operators, not interference to business, office, institutional or medical equipment. State and local governments can regulate in these areas by approving the proper siting of telecommunications antennas and transmitters.

In 1982, Congress amended the Communications Act of 1934 and established minimum electronic standards for "home electronic equipment and systems." Section 302a ("Devices which interfere with radio reception") provides in relevant part:

> (a) The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations
> (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and,
> (2) establishing minimum performance standards for home electronic equipment and standards to reduce their susceptibility to interference from radio frequency energy.

47 U.S.C. § 302a(a)(1-2) (emphasis added). The plain language of section 302a (a) clearly limits federal regulation

to devices which could emit radiation in their operation that would potentially "cause harmful interference to radio communications" and to "home electronic equipment." *Id.* This is entirely consistent with the other statutory authority directing the FCC to regulate ship and radio station signals so they do not interfere with other FCC services and signals. Congress never intended to regulate local siting considerations to protect the local businesses, churches and schools from receiving interference from the radio facilities. That is a local responsibility.

Where Congress intended regulation over interference from radio frequency energy, it has known how to say so. Congress selected areas it felt were necessary to be regulated. *Keene Co. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statutes but omits it in another . . . it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion.").

Congress was concerned with all devices that might interfere with radio communications. Subsection (1) of §302a (a)(1) is clear in this respect. However, in terms of radio communications interfering with electronic devices, Congress limited the FCC's authority to establishing minimum performance standards for "home electronic equipment."[3]

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[3] Actually, a fair and literal reading of § 302a(a)(2) would limit the FCC's authority to establishing the performance standards for home electronic equipment but the courts, demonstrating confusion or a lack of understanding of local zoning issues, transferred this limited authority to the siting of telecommunications facilities relative to impacts on home electronic equipment. *See e.g. Great Lakes Wireless Talking Machine Co., d/b/a WZSH 95 FM v. Hayes, et. al.*, CIV-91614OT (W.D.N.Y. June 25, 1991).

This is clear in subsection (2). It is restrictive in its delegation. Even if the courts were correct that they could extend this statutory authority to siting towers thereby preempting local zoning and state land use oversight relative to home electronic equipment, they are without any authority to do so relative to business and institutional equipment.

4. The FCC is Not Authorized to Regulate Business Electronic Equipment.

Radio frequency interference is a byproduct of radio-frequency radiation. The presence of RFI reveals the presence of radiation. The siting of the antennas, *i.e.* the source of the radiation, is the key to moderating or eliminating the intensity of radio-frequency interference and therefore unreasonable impacts on a community. Who regulates local placement is the underlying question in this case. No federal law prevents local regulation of the placement of these towers based on local impacts. *See e.g. AT&T Wireless PCS, Inc. v. City Council of Virginia Beach,* 155 F.3d 423, 430 (4th Cir. 1998) (". . . the opposition to the application rested in traditional bases of zoning regulation; preserving the character of the neighborhood and avoiding aesthetic blight."); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F. 3d 307, 315 (4th Cir. 1999) ("The Winston-Salem Zoning Board had 'substantial evidence' to deny a special-use permit for the construction of a 148 foot antenna near a historical house that was surrounded by low-density, single-home, residential property with no commercial property nearby."); *360 Degrees Communications Company of Charlottesville v. The Board of Supervisors of Albemarle County*, 2000 WL 346182 (4th Cir. 2000). (The Court took into consideration objections to the tower's visibility, its inconsistency with environmental preservation goals, and its impact on the character of the

area.) In each of these cases, the Fourth Circuit reversed the district court's judgment directing the local board to issue a construction permit.

Ironically, had the Charlotte, Vermont Zoning Board denied the tower in 1986 on the grounds that the 199 foot tower abutted the University of Vermont Conservation Area, the Charlotte Central Historic District or was too near residences, the Charlotte Congregational Church or Charlotte Central School, it appears the courts would have upheld the decision based on aesthetics, character of the area and so-called "traditional" zoning considerations.

The impacts of interference – a local phenomena – is a local siting consideration since it impacts the character of the area. This is very distinct from the authority the FCC operates under to protect its licensees from interference from other communication signals. The FCC has distinct statutory authority to prevent interference in those limited situations. *See e.g.* 47 U.S.C. §301 (authority to regulate interference between radio stations); §303(f) (authority to regulate interference between FCC licensees); §303m(1)(E) (authority to suspend license of operator who willfully or maliciously interferes with other radio signals); §305(a) (United States radio stations shall not interfere with FCC licensed radio stations); §306, §§320-1, §323 (interference between government and commercials stations is regulated); 354(b) and (c) (ships, including foreign ships within the jurisdiction of the U.S., shall not interfere with radio stations). Congress has statutorily directed the FCC to ensure that radio signals are not interfered with by other communication signals, including ships, governmental and licensed FCC radio stations. Congress has not enacted a statute that directs the FCC to regulate stations from interfering with electronic equipment of local business or local government services such

as a school. The first deals with a signal directly interfering with another signal which deserves protection under federal law; the second deals with the localized effects from the signal which is a local consideration.[4]

The presence of local interference from a radio or cellular facility is neither a technical nor complicated subject. Just as the biological effects of radiated power are regulated for health impacts by States and local governments, so too are the effects from radio frequency interference. There is some overlap of jurisdiction relative to the biological effects of radiation. States and local governments may not establish more stringent health standards than those established by the FCC with respect to personal wireless facilities. With respect to broadcasting facilities States and local governments jointly regulate health standards, but States and local governments are not restricted from developing more stringent standards. Appendix Y at pages 181a-182a. Similarly, radio frequency interference – a bi-product of RF radiation – is an area which may be regulated by States and local authorities. The

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[4] A telecommunications provider does not have a right to site a tower in any particular location. Its federal license authorizes it to serve a city and area but that can be accomplished from any number of sites, towns, counties or even states. Once a federal permit is gained, the licensee then must approach landowners to either purchase or lease land to site their facilities. Finally, they must gain local and state approval to site the tower on the purchased or leased land. The skirmishing which results in cases such as this one is the attempt by the industry to reduce oversight by local entities versus the attempts by local residents or boards to retain some control over their communities. This has become a more heated battle as the cellular and other personal wireless facilities struggle to gain multiple sites to serve their constituencies throughout the country.

inference by which the Second Circuit found FCC preemption was based on the fiction advanced by the industry that such issues are technical and must be regulated by the FCC.

The science is available to predict the location and extent of the interference before an antenna and its support structure are sited and constructed. The people of a community have a right to plan and regulate local land use through reasonable zoning regulations and conditions that will reduce the impact of such facilities on their communities. By placing the burden on the residents of the Town of Charlotte rather than the telecommunications industry, the Circuit Court disregards the Tenth Amendment and infers that Congress intended to preempt the field despite the fact that Congress developed precise and explicit language authorizing the FCC to regulate certain activities relative to interference.

The Second Circuit found that residents, businesses, schools and churches could lodge complaints with the FCC and that the FCC would resolve blanketing interference problems. Appendix A at page 30a. That too is wrong. The Second Circuit misunderstood 47 U.S.C. §302a. The FCC rules only cover devices that receive transmissions from FCC regulated services. The FCC blanketing interference rules are limited in scope and do not purport to cover non-receiver electronic equipment found in most businesses and institutions. The blanketing interference rules were promulgated to carry out the FCC's responsibility to maintain the integrity of FCC regulated services. *See e.g.* 47 U.S.C. 303(f) and 303(m)(1)(E). The FCC is expressly authorized to regulate electronic devices which *emit* radio frequency energy and are therefore capable of causing harmful interference to FCC regulation services. 47 U.S.C. §302a(a)(1). The Second Circuit failed to appreciate these aspects of FCC regulation. Appendix A at page 22a-23a.

Cases upon which the Second Circuit relied are based on either a town's attempt to regulate radio stations or a town's attempt to regulate "home electronic equipment or systems" under 47 U.S.C. § 302a(a)(2). They do not address interference to business and institutional equipment. Congress has explicitly made the determination that the FCC does not have the authority to regulate such matters.

5. Legislative History Proves No FCC Authority.

The plain meaning appears to answer the question clearly and succinctly, but in case the Supreme Court concludes there is some ambiguity and wishes to look behind the veil of language into legislative history, there is ample evidence supporting the Petitioners' position that no preemption of business electronic equipment was intended. The legislative history shows that Congress did not intend the FCC to have exclusive control over all types of RFI. The Conferees Report cited in *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, *supra*, and *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994) ends debate on the issue. Congress only authorized the FCC to regulate performance standards of "home electronic equipment." Congress went to great lengths to distinguish the FCC's authority over home electronic equipment as opposed to business electronic equipment.[5] The Conferees Report states in pertinent part:

> The Conferees intend that the Commission's authority apply only to "home electronic

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[5] This explains why the FCC has not attempted to promulgate rules addressing business electronic equipment.

> equipment and systems" likely to be found in the private residence and intended for residential use, as distinguished from devices intended for office and business use.

U.S. Code Cong. & Admin. News, 97th Cong. 2nd (1982), 2237, 2276. Congress did not intend federal regulation in the form of performance standards for business or institutional equipment. This section of legislative history was omitted by the Second Circuit in its analysis and decision.

The Neighbors do not dispute that the telecommunications law partially preempts state and local authority, but that preemption is limited to conflicts among licensees and possibly to conflicts involving home electronic equipment, as explained above. Except with respect to devices which are capable of emitting harmful interference, business electronic equipment remains untouched by federal law. 47 U.S.C. §302a. It is reserved to the states by this Court's precedent and the Tenth Amendment to the United States Constitution.

The Court of Appeals attempted to distinguish these clear authorities by asserting that the type of recipient of interference was immaterial. Appendix A at page 22a. This holding violates the distinction explicitly created by Congress. It was Congress that decided, in plain, unambiguous terms, that preemption would apply to interference with home devices, but would not apply to interference with business devices. It is this distinction that must be upheld.

In a recent case interpreting the authority of the FCC in relation to municipal regulation where the City Council denied appellees' application to erect a telecommunications

tower[6] the District Court ordered the Council to approve the tower; and the Fourth Circuit reversed, finding no violation of the Act. *AT&T Wireless PCS, Inc.*, *supra*. In explaining its decision, the Court wrote, "the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result." *Id.* at 4. Local regulation would not conflict with the purposes of the Act, according to the Court; "our reading simultaneously furthers the Act's explicit goals of facilitating competition, by strengthening the hand of new market entrants who cannot show that they have been unreasonably discriminated against, and of preserving a large portion of local authority by maintaining that authority in particular cases." *Id.* at 5. The Act was never designed to destroy local authority to regulate the siting of telecommunications towers, according to the Court, only to ensure that the review was fair and compatible with the purposes of the Act.

Just as in *AT & T Wireless*, the interference concern is a local neighborhood issue. It is a siting issue. A court's traditional discomfort with technical matters is not involved here, because no FCC technical issues are involved. The issue is basic to zoning: where should something offensive best be placed. The Town of Charlotte thought it had the answer by first denying the application based on location and then approving a different location when the applicants promised to cure any problems that arose relative to

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[6] The AT&T Wireless case involved a cellular tower or a "personal wireless facility, as opposed to a broadcast facility like WIZN.

interference. The zoning board accepted this concession, but attached a reasonable condition. Now, when the permittees are to be held to account for their promises, they claim preemption as a shield.

The plain meaning and legislative history of section 302a together with the case law show that Congress intended, and the courts have found, federal preemption only of local regulation of interference to home electronic equipment and between licensees and other operators, not of business and institutional equipment.

6. The 1996 Amendments.

The 1996 amendments to the Federal Communications Act of 1934 provide compelling evidence of ZBA authority to regulate siting decisions. Section 107(a)(7) of the House bill, H. 1555 (1996), included preemption language stating that the FCC should adopt guidelines regulating the placement, construction, modification, or operation of facilities of commercial mobile services. H. 1555 as of May 3, 1995, Section 704(a)(7). Appendix W at page 171a. These preemption provisions were removed from the final version of the Act. As the U.S. Supreme Court has stated when divining congressional intent, "we are mindful that Congress had before it but failed to pass, just such a scheme." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank,* 114 S. Ct. 517, 526 (1983). Therefore, Congress clearly intended state and local governments to continue to control in this area as they have always done.

According to section 704 (1996), as long as state and local controls of "personal wireless service facilities" remain within the enumerated limitations, there is no federal

preemption of state and local authority, except for health matters.[7] Appendix N at page 121a.

State and local government are the governments directly responsible for the health, safety and welfare of their residents. Narrowing their authority will significantly impair these governments' ability to function in ways essential to their existence. *Commercial Mortg. Ins. Inc. v. Citizens Nat. Bank of Dallas, D.C. Tex.*, 526 F.Supp. 510, 523 (1981).

7. The Neighbors' Remedies Are Not Available at the FCC.

The Court of Appeals reasons that the Neighbors are not without a remedy, but merely need to bring their concerns to the FCC. But the FCC has not adopted regulations covering this issue. Although the FCC has adopted regulations to resolve complaints of interference those regulations do not cover matters such as those being considered here. The FCC rules address permanently and correctly installed *receivers*, within what is called the "blanketed area" which is where the signal is particularly strong and interference is likely. These rules are a manifestation of the FCC's role in prohibiting interference to the services its regulates. The FCC is authorized to protect its regulated services from receiving interference. 47 U.S.C. §302a. In addressing FM broadcast station blanket interference the FCC has specifically excluded from its rules

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[7] Congress has preempted the regulation of "radio frequency emissions." This has been interpreted by the FCC to preempt states from regulating the placement of personal wireless facilities on the basis of the health effects from radiation. The FCC has concluded that it has no such oversight over broadcast facilities. Appendix Y at page 179a-182a.

most consumer devices. Section 73.318 provides in relevant part:

> (b) After January 1, 1985, permittees or licenses who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one year period . . . . Resolution of the complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

The Neighbors' concerns are properly before the state and local tribunals. If they cannot find relief there, they cannot look to the FCC, since it has not promulgated any rules to deal with these issues. State and local jurisdiction does not conflict with FCC regulation. Meaningful, reasonable regulation will enhance, not defeat, this industry.

The law is clear that State and local government may regulate the type of interference being addressed in this proceeding. If a telecommunications or broadcasting facility believes it has been denied its rights it has an explicit avenue to address any alleged violations. *See* 47 U.S.C. § 332(c)(7)(B)(v).

CONCLUSION

The technological age has given people the right to have a cellular telephone and access to digital television and other forms of competitive communication services. In doing so it has significantly affected the way we live in both direct and more subtle ways. With the introduction of new and expanded types of telecommunications facilities within our communities it has also created zones where businesses, schools and religious establishments cannot operate computers, telephones, medical equipment, and other types of electric and electronic business machines. New telecommunication technologies have strained communities in Vermont and elsewhere to accommodate new entrants into the market place. Local communities have been willing to accept reasonable burdens to allow their communities and adjoining regions the privilege of these new technologies, however, our communities must also be accorded the right to approve the siting of those facilities in a manner that mitigates the impacts on local businesses and residents. The present case offers the Court with the opportunity to provide guidance to the industry, FCC and states and local communities regarding the siting of telecommunication facilities. There is no scientific or legal reason why communities cannot have both reliable forms of diverse communications and reliable functioning electronic equipment in their businesses, schools and churches.

The Town of Charlotte is not preempted from exercising reasonable oversight and control over radio and cellular services that cause pervasive, harmful interference to the Town and its citizens. Congress never authorized nor intended the FCC to regulate the interference of business and institutional electronic equipment. Congress only authorized the FCC to establish performance standards for home

electronic equipment. Any ambiguity reveals that the Conferees expressly limited the FCC's authority to home electronic equipment.

The Court of Appeals Decision in this case violates basic principals of preemption law and thereby deprives municipalities their basic ability to protect their citizens. Radio frequency interference issues have been addressed by Congress. Congress has deliberately decided to leave to municipalities the responsibility for determining whether the impacts from radio frequency interference on local businesses are appropriate under local zoning ordinances. The Court should accept certiorari to resolve this important question of federal law.

Respectfully submitted,

/s/_____

Gerald R. Tarrant
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05601-1440

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed February 23, 2000]

No. 97-9141

GRAEME FREEMAN, MARY BETH FREEMAN, FRANK ITTLEMAN, ELAINE ITTLEMAN, MIKE FOURNIER, HOLLY FOURNIER, ELLEN LANE, WILLIAM PINNEY, JR., MARK W. BOLLES, CLAUDIA MUCKLOW, DONNA A. WARK, IRIS MUGGENTHALER JAMES H. SQUIRES LAWRENCE HAMILTON, ROBERT CARMODY, MARK MUSIEL, MICHAEL YANTACHKA, LORIE GADBOURY, CHRIS MCGEE, PETER COLEMAN, BARBARA SANFORD FARRELL, AND WILLIAM PINNEY, SR.,	)
Plaintiffs -Appellants,	)
v.	)

BURLINGTON)
BROADCASTERS, INC.,)
d/b/a WIZN, CHARLOTTE FIRE)
& RESCUE SERVICES INC., and)
NYNEX MOBILE LIMITED)
PARTNERSHIP 1, d/b/a BELL)
ATLANTIC NYNEX MOBILE,)
Defendants - Appellees.)
)

August Term 1999
Argued: October 15, 1999

Before: NEWMAN, WALKER and SOTOMAYOR, Circuit Judges.

Appeal from the August 11, 1997, judgment of the United States District Court for the District of Vermont (William K. Sessions, III, Judge), dismissing, for lack of subject matter jurisdiction, an administrative appeal removed from the Vermont Environmental Court.

Affirmed as modified.

JON O. NEWMAN, Circuit Judge:

This appeal raises a preemption issue pitting federal authority in the field of radio communications against local zoning authority. The precise issue is whether the Federal Communications Act of 1934, as amended (FCA), and regulations promulgated by the Federal Communications Commission (FCC) preempt a local zoning board's power to enforce a condition of a permit to construct and use a

communications tower; the permit condition requires the permittees to remedy any radio frequency interference ("RF interference" or "RFI") from tower signals with appliances and devices in local homes. Appellees Burlington Broadcasters ("WIZN"), Charlotte Volunteer Fire & Rescue Services ("CVFRS"), and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile ("BANM") transmit radio signals from a tower in Charlotte, Vermont. The Appellants, homeowners living near the tower ("Homeowners"), appeal from a judgment by the United States District Court for the District of Vermont (William K. Sessions, III, District Judge) dismissing after removal from the Vermont Environmental Court, their appeal from a decision of the Town of Charlotte's Zoning Board of Adjustment ("ZBA") that held the condition unenforceable See In re Freeman, 975 F. Supp. 570 (D. Vt. 1997). We agree with both the local agency and the District Court that federal law preempts enforcement of the permit condition, but we conclude that the appropriate disposition is not to dismiss the removed appeal but to affirm the ZBA's decision on the preemption issue.

Background

Facts. The underlying facts are largely undisputed. Appellee WIZN operates a radio station under an FCC license, which authorizes WIZN to broadcast from a 199-foot tower in Charlotte. Appellee BANM transmits cellular telephone calls from four 13-foot "whip" antennas mounted on the tower. Appellee CVFRS uses tower transmitters intermittently in connection with providing fire and ambulance services to the Town of Charlotte.

In late 1986, WIZN and CVFRS sought a permit from the Town of Charlotte to build a tower on Pease Mountain and to transmit radio signals from it. At a hearing to discuss the matter, a WIZN representative assured concerned townspeople that there would not be any RF interference with their home electronic devices, and that if such interference occurred, WIZN would "trap it out." The phenomenon of RF interference is explained in the legislative history of the 1982 Amendments to the FCA: "Radio frequency interference arises when a signal radiation by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes malfunction of some other electronic device." H.R. Conf. Rep. No. 97-765, at 21 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2265.

In January 1987, the Town of Charlotte's Zoning Board of Adjustment ("ZBA") issued WIZN and CVFRS a permit to construct and use the tower on the express condition that "any interference with reception in homes in the area because WIZN began broadcasting will be remedied by WIZN." After the tower was built, WIZN conveyed ownership to CVFRS. In April 1987, WIZN began broadcasting from space on the tower leased to it by CVFRS. In 1991, BANM's predecessor and CVFRS received approval from the ZBA to mount four whip antennas on the tower for the purpose of cellular phone signal transmission. Although a representative of CVFRS orally assured the ZBA that the antennas would cause no interference, BANM was not required to agree to any conditions concerning RF interference.

State administrative proceedings. On April 5, 1996, in response to a considerable number of RF interference complaints by the Appellants and other Charlotte residents, the Charlotte Zoning Administrator issued a notice of violation to WIZN, BANM, CVFRS, and the landowner. The notice alleged that the facility caused long-term and continuous RF interference in violation of the condition of WIZN's permit.

The cited parties appealed the notice of violation to the ZBA, which conducted public hearings in May 1996 pursuant to Vt. Stat. Ann. tit. 24, § 4467 (1992 & Supp. 1999). The Homeowners, the Appellants in the pending appeal, appeared as "interested persons" under id. § 4464 (b) and identified various RF interference problems with their household electrical and electronic devices. On July 11, 1996, the ZBA issued its Notice of Decision. The ZBA found that

> WIZN has caused continuous and widespread RFI that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property. In addition, the Board finds that these individuals have expended substantial amounts of money in their attempts to remedy interference problems.

Notice of Decision at 5. The ZBA also commented on WIZN's sluggishness in responding to complaints. The ZBA noted that "[w]hile WIZN successfully reduced and/or eliminated RFI in some cases, other Charlotte residents continue to experience annoying, costly, and burdensome interference problems." Id. However, the ZBA found "no

credible evidence" demonstrating that any of the other cited parties – CVFRS, BANM, and the landowner – caused RF interference. Id.

Although the ZBA found that WIZN was in violation of the condition of its permit, the ZBA also concluded that its authority to enforce the permit condition was preempted by the federal government's occupation of the field of RF interference regulation. The ZBA also noted that Vermont law provides that, under some circumstances, co-permittees and property owners are jointly liable for violations, but found that any such co-permittee liability was also subject to preemption.

The Homeowners and the Town of Charlotte appealed the decision of the ZBA to the Vermont Environmental Court pursuant to Vt. Stat. Ann. tit. 24, § 4471 (1992 & Supp. 1999). In addition to challenging the preemption decision concerning enforceability of the permit condition, the parties argued that state or local jurisdiction existed over claims of fraud, deceit, or misrepresentation against WIZN, BANM, and CVFRS, and that Charlotte residents had been denied unspecified consumer rights. The Homeowners also challenged the ZBA's factual finding that only WIZN, and not CVFRS, BANM, and the property owner, caused the RF interference.

District Court proceedings. Before decision by the Vermont Environmental Court, the Appellees removed the

case to the District Court.[1] BANM moved to dismiss, pursuant to Rule 12(b) (1), for lack of subject matter jurisdiction, and, pursuant to Rule 12 (b)(6), for failure to state a claim. WIZN also moved to dismiss for failure to state a claim. CVFRS joined both motions. The thrust of all the Appellees' arguments was that pervasive federal regulation preempted enforcement of the locally imposed condition. The District Court recognized its obligation to consider subject matter jurisdiction, but did so primarily by inquiring whether local regulation of RF interference was federally preempted. The Court concluded that federal law conferred exclusive jurisdiction on the FCC to regulate RF interference. Turning to the Homeowners' allegation of fraud and deceit, based on the Appellees' promise to the ZBA either to avoid RF interference with home devices or eliminate it, the Court distinguished between the Homeowners' possible remedies; to the extent that they sought the remedy of eliminating RF interference, the Court ruled that such a remedy was preempted, and to the extent they were seeking (or even had standing to seek) any other relief, their claims "were not part of the proceeding from which they appealed, and are properly before this Court." Freeman, 975 F. Supp. at 576. Based on its preemption ruling and its ruling that any non-preempted remedy for fraud and deceit was outside the scope of the state court appeal, the District Court dismissed the removed case for lack of subject matter jurisdiction.

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[1] The Town of Charlotte sought and received permission to withdraw from the case.

Discussion

I. - Subject Matter Jurisdiction

A. Jurisdiction Based on the Preemption Issue

Although neither party has questioned the District Court's subject matter jurisdiction, the matter is not self-evident, and we are obliged to consider it. See Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 485 (2d Cir. 1998). And, although an objection to the propriety of removal is forfeited by failure to assert it, see id. at 487-88, subject matter jurisdiction must exist, if not at the time of removal, then at least at the time the District Court entered judgment, see Grubbs v General Electric Credit Corp., 405 U.S. 699, 705 (1972); Fax Telecommunicaciones, 138 F.3d at 488.

The Appellees removed from the Vermont Environmental Court a civil action brought to that court by the appeal of the Homeowners from the administrative ruling of the ZBA. An appeal of an administrative ruling to a state court is removable to a federal district court so long as the complaint to the state court presents a well pleaded claim arising under federal law. See City of Chicago v. International College of Surgeons, 522 U.S. 156, 163-64 (1997).

Whether the pending case satisfies the standard of City of Chicago merits careful consideration. City of Chicago, although involving review of an agency decision, presented a traditional federal-question case: the state court plaintiff's complaint alleged that the action of the defendant (a city

agency) and the ordinance under which the defendant acted violated the plaintiff's constitutional rights. As the Supreme Court explained, even though state law (Illinois's Administrative Review Law) created the plaintiff's cause of action, that cause of action nonetheless arose under federal law because the plaintiff's "'right to relief under state law require[d] resolution of a substantial question of federal law.'" Id. at 164 (quoting Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 13 (1983)).

The pending case differs from City of Chicago in three respects. First, unlike the state court plaintiff in City of Chicago, who filed a complaint, the Homeowners invoked the jurisdiction of the Vermont Environmental Court by filing a notice of appeal. That technical difference is irrelevant for purposes of determining the district court's removal jurisdiction. District courts have original jurisdiction over federal claims seeking review of an administrative decision, whether the court case is initiated by a complaint, see, e.g., 42 U.S.C. § 405(g) (authorizing action to "review" final decision of Commissioner of Social Security), or a petition for review, see, e.g., 28 U.S.C. § 2344 authorizing action to "review" final order of various federal agencies).

Second, the plaintiff's initial pleading in the state court in City of Chicago set forth a cause of action, whereas the Homeowners presented their issues to the Vermont Environmental Court by a Statement of Questions, pursuant to the required local procedure. See Vt. R. Civ. P. 76(e) (4) (B) (Supp. 1999). Although a "Statement of Questions" does not present a claim that may be examined to determine if it arises under federal law in quite the same manner as a

"complaint" asserting a cause of action, this technical difference also provides no basis for rejecting federal subject matter jurisdiction. The well-pleaded complaint rule is concerned with the existence of a federal question on the face of the document invoking a state court's jurisdiction, not whether that document bears the label "complaint."

Arguably more significant is a third distinction: the issue tendered to the Illinois state court in City of Chicago was whether the local agency's ordinance or action violated the Constitution, whereas the issue tendered to the Vermont Environmental Court was whether federal law preempted enforcement of the condition of the Appellees' permit. The preemption issue was initially tendered in it this case when it was asserted by the Appellees before the ZBA as a defense to the Zoning Administrator's notice of violation. Under the "well-pleaded complaint" rule see Franchise Tax Board, 463 U.S. at 9; Gully v. First National Bank, 299 U.S. 109, 113 (1936) ("[T]he controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."), a state law complaint, filed in a state trial court, that tries to anticipate a defense of federal preemption will not support federal question removal jurisdiction, see Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); Gully, 299 U.S. at 116 ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby."), unless the limited doctrine of "complete preemption" applies, see Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63-64 (1987). Under that doctrine, the plaintiff's state law claim, recharacterized pursuant to the "artful pleading" rule, see Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754, 758 (2d Cir. 1986), is said

necessarily to arise under federal law, regardless of how the plaintiff has pled the claim, see Metropolitan Life, 481 U.S. at 63-64. In the FCA context, we have ruled that the "complete preemption" doctrine does not apply with respect to state law billing claims and other business practice claims. See Fax Telecommunicaciones, 138 F.3d at 486; Marcus v. AT&T Corp., 138 F.3d 46, 53 (2d Cir. 1998). It is arguable, however, that the complete preemption defense applies to state law claims that concern technical aspects of electronic transmissions, and we might well support subject matter jurisdiction in this case on that basis. We need not do so, however, because of an alternative basis for satisfying the well-pleaded complaint rule

Although the preemption issue was initially asserted defensively by the Appellees at the administrative level, later, when the Homeowners invoked the jurisdiction of the Vermont Environmental Court, they did so by tendering the preemption issue affirmatively as the initial question to be decided in their effort to reverse the decision of the ZBA. After explaining that the ZBA had ruled that the condition of WIZN's permit was void because of federal preemption, the Homeowners' Statement asked as a first question, "Does federal law preempt state and local jurisdiction over interference?" Although it is arguable that the defensive nature of the preemption issue when first injected into the case at the agency level should govern throughout the litigation at least for purposes of determining federal question jurisdiction, we think the better approach is to permit removal when a litigant's initial entrance to a state court seeks a decision that an administrative ruling upholding a federal preemption

defense is erroneous.[2] Our view rests on the reason why the well-pleaded complaint rule has been fashioned to bar anticipation of a federal defense.

The well-pleaded complaint rule is usually justified as a protection against the undue expansion of federal court jurisdiction that would occur if a plaintiff with only a state law claim could invoke federal jurisdiction simply by speculating that the defendant might assert a federal defense. See, e.g., Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 910-11 (4th ed. 1996) ("Hart and Wechsler") (well-pleaded complaint rule "designed to avoid making original jurisdiction turn on speculation as to what issues will be decisive in the litigation") (footnote omitted). However, after a state or local agency has considered a federal defense, such as preemption, tendered by a defendant, and ruled that the defense is valid, the reason for the well-pleaded complaint rule has been substantially diminished: the federal defense is no longer

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[2] The procedural posture of this case is to be distinguished from that of a plaintiff entering state court to seek a declaratory judgment that a defendant's anticipated preemption defense to the plaintiff's state law claim is unavailing. That would be the classic anticipation of a federal defense that the well-pleaded complaint rule bars. In the pending case, a local governmental agency has ruled that the preemption defense is valid. The state court plaintiffs want not only a decision on the preemption defense; they want a court to reverse an adverse administrative ruling that is grounded on federal law.

merely a matter of speculation.[3] Thus, when the Homeowners sought judicial review of the ZBA's preemption ruling, the federal defense had been adjudicated and the Homeowners entered the state court to obtain judicial review of the agency ruling. They were not merely seeking a declaratory judgment from the Vermont Environmental Court, which might well not have been removable,[4] but rather exercising their state law right to obtain judicial review of agency action, the same procedural route that justified removal in City of Chicago. And, as in City of Chicago, the state court suit, though authorized by state law, arose under federal law because of the nature of the federal question on which the outcome depended.

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[3] The Hart and Wechsler treatise pointedly queries, "[D]id it make sense to apply the rule where, as in [Louisville & Nashville R. Co. v.] Mottley [, 211 U.S. 149 (1908)] itself, the jurisdictional issue arose for the first time on appeal at a time when both parties and the court below agreed that the case turned entirely on federal issues?" Hart and Wechsler at 911 n.5.

[4] Removal of a declaratory judgment action normally turns on whether the coercive action as to which a declaration is sought would have stated a federal claim on the face of the complaint. See Franchise Tax Board, 463 U.S. at 17-22 (rule of Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), applies to state court declaratory judgment actions). Attempted removal of a state court declaratory judgment action in the pending case would have encountered the objection that the coercive enforcement action to which the declaratory judgment action related would have been the enforcement suit by the Zoning Enforcement Officer, a suit that would not have included a federal claim.

The logic of permitting removal once a federal defense has been adjudicated could arguably be invoked to justify removal of a state court appeal from a state trial court decision adjudicating a federal defense.[5] However, removal of such an appeal would encounter the obstacle of the Rooker/Feldman doctrine, prohibiting a federal district court from exercising appellate jurisdiction over a state court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 474 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). Since this case involves removal of a case pending in a state court of first instance, seeking review of an agency decision adjudicating a federal issue, it could have been brought originally in a district court, and is therefore properly removable. See 28 U.S.C. § 1441(a) (1994). We also observe that had the state agency adjudicated the federal issue adversely to the Appellees, they could have brought an action in the District Court to enjoin enforcement of the condition of the zoning permit. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983).

B. Jurisdiction Based on Other Issues

In addition to tendering the preemption issue to the Vermont Environmental Court, the Homeowners also raised other issues: whether BANM and CVFRS have caused RF interference? 2) Whether BANM and CVFRS bear joint liability with WIZN as co-permittees? (3) Whether WIZN,

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[5] Adjudication of a federal defense in a suit not otherwise within the jurisdiction of a federal court (where no party challenges federal jurisdiction) does not create federal question jurisdiction. See Mottley, 211 U.S. at 152.

BANM, and CVFRS are subject to state or local jurisdiction for fraud, deceit, and misrepresentation arising from the promises made when the permit was issued? 4) Whether WIZN, BANM, and CVFR have violated some unspecified consumer rights?

These issues raise only state law questions.[6] City of Chicago instructs that where a removal petition properly invokes district court's subject matter jurisdiction over matters initially presented to an administrative agency, that court's authority to consider other issues turns on traditional considerations applicable to the exercise of supplemental jurisdiction under 28 U.S.C. 1367(a) . See City of Chicago, 522 U.S. at 164-65. Since the federal claim (that the ZBA's preemption ruling is erroneous) failed at the outset in the District Court, it would be inappropriate to exercise supplemental jurisdiction with respect to the state law claims, especially in a removed case like this one, where a federal

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[6] In presenting the fourth issue, denial of unspecified consumer rights, to the Vermont Environmental Court, the Homeowners made a passing reference to federal law by citing a provision of the Telecommunications Act of 1996, Pub. L. 104-104 § 101(a), 110 Stat. 56, 70 (1996) (codified at 47 U.S.C. § 253 (b) (Supp. 1997)), which provides: "Nothing in this section shall affect the ability of a State to impose . . . requirements necessary to . . . safeguard the rights of consumers." The "section" to which subsection 253 (b) refers concerns access to the provision of telecommunications service. See 47 U.S.C. § 253(a). It has nothing to do with radio transmissions. The Appellants wisely do not pursue on appeal any claim that subsection 253(b) creates subject matter jurisdiction. We consider in Part II the effect of section 253 on the merits of the preemption issue.

court would be obliged to consider the extent to which such claims had been sufficiently tendered to the ZBA to make them available for review in the Vermont Environmental Court. We consider in Part III the consequence of not exercising such jurisdiction.

II. Federal Preemption

This Circuit has not yet confronted the issue whether federal law preempts state and local regulation of RF interference. Of the various forms of federal preemption, the most pertinent to the pending inquiry is so-called "field preemption": state law is preempted when the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). As is always the case in preemption analysis, Congressional intent is the "ultimate touchstone." Cippolone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted). Consistent with this view of the importance of congressional intent, the Supreme Court has explained that "field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." English v. General Electric, 496 U.S. 72, 79 n.5 (1990); see also 1 Laurence H. Tribe, American Constitutional Law § 6-31 (3d ed. 1999).

For the reasons below, we conclude that federal law has preempted the field of RF interference regulation.

The FCC's Statutory Authority to Regulate Radio Broadcasting. Several statutory provisions indicate the extent of the FCC's authority and responsibility to regulate radio broadcasting. 47 U.S.C. § 151 states the purposes of the FCA, among them to "centraliz[e] authority heretofore granted by law to several agencies" in the FCC, and to "grant[] additional authority with respect to interstate and foreign commerce in wire and radio communication" to the FCC. Section 301[7] provides that "it is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission" under licenses granted by the FCC in accordance with the FCA. Subsection 307(b) requires the FCC to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each."

Moreover, under subsection 302a(a) (1), the FCC has power to "make reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation conduction, or other means in sufficient degree to cause harmful interference to radio communications." Section 303 grants extensive powers to the FCC to regulate radio broadcasting technology and RF interference phenomena. Among other powers, subsection 303(d) empowers the FCC to "[d]etermine the location of classes of stations or individual stations." Subsection 303(e) empowers the FCC to

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[7] Unless otherwise indicated, all statutory sections cited are in Title 47.

"[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein." Subsection 303(f) allows the FCC to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter." Subsection 303(h) confers "authority to establish areas or zones to be served by any station."

These statutory provisions make it clear that Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting. See Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963); Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997 (6th Cir. 1994). This authority is embedded in the FCC's broad authority to develop a comprehensive national regulatory system governing telecommunications. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 219-20 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1934).

Moreover, the legislative history of the 1982 Amendments to the FCA, Pub. L. No. 97-259, 96 Stat. 1087 (1982), supports the conclusion that Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation. The House Conference Report states with respect to enacting section 302a, which empowers the FCC to set manufacturing standards for home electronic equipment to minimize the RF interference effects of signals from nearby transmitters:

> The Conference Substitute is further intended to clarify the reservation of exclusive

> jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

H.R. Conf. Rep. No 97-765, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2277. This statement from the legislative history is consistent with our inference of complete preemption from Congress's comprehensive legislation in the field and Congress's explicit delegation of authority to the FCC to regulate the instrumentalities of radio broadcasting throughout the United States

The FCC's Regulation of RF Interference Through Rule-making. Federal regulations have the same preemptive force as federal statutes. See Fidelity Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1983). The FCC has exercised its rule-making power to extensively regulate the technologies involved in FM broadcasting. See, e.g., 47 C.F.R. §§ 73.201-73.333 (1998). These rules govern, among other things, the power and height of antennas, see id. § 73.211, the use of common antenna sites, see id. § 73.239, and FM transmitter locations see id. § 73.315. Most

significantly, the FCC regulates "FM blanketing interference," which is the sort of interference complained of by the Homeowners. See id. § 73.318. The FCC first defines the area assumed to be blanketed by radio emissions as a function of the effective radiated power of the antenna. Notably, the FCC imposes a requirement that licensees remedy the RF interference occurring in that area: "[P]ermittees or licensees who . . . are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one-year period. . . . Resolution of complaints shall be at no cost to the complainant." Id. § 73.318(b).[8] Following the one-year period, the licensee or permittee must provide technical information or assistance to complainants concerning remedies for interference. See id. § 73.318(d). Finally, pursuant to an explicit grant of authority under subsection 302a(a) (1), the FCC has promulgated extensive regulations governing devices that emit either intentional or incidental RF interference. See 47 C.F.R. pt. 15 (1998).

In light of our conclusion that Congress intended that the FCC enjoy exclusive jurisdiction to regulate RF interference phenomena, the FCC's regulations cannot be said to be anything other than reasonable interpretations of the scope of FCC authority, and thus are entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 842-43 (1984).

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[8] The FCC excludes complaints resulting from malfunctioning or improperly used receivers and antenna systems, mobile receivers, tape recorders and phonographs, and high gain antennas or antenna booster amplifiers. See 47 C.F.R. § 73.318(b).

The FCC's Interpretation of the Scope of Preemption. An agency's interpretation of an ambiguous statute it is charged with administering is entitled to Chevron deference not only when the agency interprets through rule-making, but also when it interprets through adjudication. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 574 (1988). To whatever extent any ambiguity exists in the FCA, the FCC has resolved this ambiguity in favor of federal preemption of RF interference issues. Cf. City of New York v. FCC, 486 U.S. 57, 64 (1988) ("If the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.") (citation and internal quotation marks omitted). In In re Mobilecomm of New York, Inc., 2 F.C.C.R. 5519 (Common Carrier Bureau 1987), the FCC examined two sections of the Code of the Town of Wilton, Connecticut, that purported to regulate RF interference. Wilton's Code required that a paging signal transmitter notify the Town's Planning and Zoning Commission when it changed the power and/or frequency of its transmission, and provided that "[n]o operation shall be permitted which produces any perceptible electromagnetic interference with normal radio or television reception in any area within or without the town." Id. ¶ 3 n.3. The FCC determined that Wilton's rule was preempted by federal law, see id. ¶¶ 8-11, and rejected Wilton's argument that its zoning regulations were "reasonably tailored police powers necessarily enacted for the protection of town residents." Id. ¶ 5. See also In re 960 Radio, Inc., FCC 85-578 ¶ 3, 1985 WL 193883 (1985) (holding that FCC's exclusive jurisdiction

over RF interference between two radio stations preempted enforcement of use permit conditioned on station's "not operat[ing] [its] new facility so as to produce electronic interference to existing facilities").

The Homeowners' Arguments That Federal Law Authorizes Local Regulation of RF Interference. The Homeowners make three arguments that federal law expressly or impliedly exempts from preemption state and local regulations like the permit condition at issue. We disagree with these arguments.

First, the Homeowners rely on the 1982 Amendments, which, among other things, grant the FCC authority to promulgate performance standards for consumer electronic equipment. See 47 U.S.C. 302a(a)(2). The Appellants argue that this limited grant of authority reflects a conscious decision by Congress to confer on the FCC exclusive power to set standards for consumer electronic equipment but not business electronic equipment, leaving RF interference affecting business electronic equipment available for local regulation. Because the ZBA found that the WIZN signal interfered with equipment used for business the argument continues, the condition on WIZN's permit is not preempted by federal law or regulations.

This argument is untenable. Although Congress limited the FCC's standard-setting authority to consumer electronic equipment, this limited grant of authority concerns devices that receive RF interference, not devices that emit radio signals. Thus, were we to infer from the statute's inclusion of consumer electronic equipment the exclusion of business electronic equipment, we would conclude at most

standards for the manufacture of business electronic devices) that would minimize malfunctions caused by the receipt of RF interference.[9] This is an altogether different matter from the regulation of radio transmitters emitting radio signals that are the source of RF interference in recipient devices. In fact, Congress explicitly granted the FCC authority to regulate RF emissions causing interference. See 47 U.S.C. § 302a(a)(1). Finally, we note that the provision relied upon by the Homeowners was passed as part of the 1982 Amendments. The Conference Report for these amendments, quoted above, explicitly states Congress's intent to preempt any local or state attempts to regulate or remedy RF interference.

Second, the Homeowners argue that the 1996 Amendments "preserve" local zoning authority over RF emissions. They point to two provisions: one provision concerns wireless telephones (and thus implicates the Homeowners' claim against BANM) and the other concerns common carrier regulations.

The Homeowners argue that the wireless telephone provisions in the 1996 Amendments affect the analysis whether the ZBA has the authority to regulate RF interference

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[9] The legislative history reveals that Congress was responding to increasing complaints concerning RF interference with home electronic equipment. However, Congress determined that business equipment manufacturers were already adequately safeguarding their electronic equipment from RF interference, and that FCC standard-setting was not necessary to resolve that problem. See H.R. Conf. Rep. No. 97-765, at 32-33, 1982 U.S.C.C.A.N. at 2275-76.

attributable to BANM.[10] They point to subsection 332(c)(7)(A), entitled "Preservation of local zoning authority," which states:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities.

Thus, Congress did preserve some local zoning authority over the placement of wireless services transmitters like BANM's. However, we conclude that Congress did not intend by this provision to repeal the FCC's exclusive jurisdiction over RF interference complaints The statute's preservation of local power extends only to "placement, construction and modification" of "facilities." In light of the FCC's pervasive regulation of broadcasting technology, this provision is most reasonably understood as permitting localities to exercise zoning power based on matters not directly regulated by the FCC. Cf. AT&T Wireless PCS, Inc. v. City of Virginia Beach 155 F.3d 423, 427 (4th Cir. 1998) (upholding under this provision city's denial of building permit to wireless services provider, when that denial rested on "traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight"). Moreover, this interpretation is supported by the express provision in the 1996 Amendments forbidding implied repeal:

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[10] We note that the ZBA found none.

> (c) Federal, state, and local law. --
>
> (1) No implied effect. -- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. No. 104-104, § 601, 110 Stat. 56, 143 (1996) (codified in notes to 47 U.S.C. § 152 (1994 & Supp. 1997)). It would contravene this provision to find that subsection 332(c)(7) impliedly repeals the FCC's exclusive authority to regulate RF interference. We note also that the legislative history indicates that this preservation of authority "relate[s] to local land use regulations and [is] not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities." H.R. Conf. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, at 223.

The amicus brief of the Vermont Senators and Congressman also cites subsection 332(c)(7) in arguing against the ZBA's preemption ruling. Their point is that no provision similar to this subsection, which concerns personal wireless service, can be found regarding the "siting" of radio broadcast towers. Brief of Amicus Curiae Leahy et al. at 4. However, the preexisting pervasive federal regulation of RF interference suffices to resist any negative implication that might otherwise be drawn from subsection 332(c)(7). Moreover, local authority over siting of broadcast towers,

based on considerations not within the exclusive regulatory authority of the FCC, remains unimpaired.

The Homeowners also point to the 1996 Amendments' common carrier regulations, codified in section 253 and reading in part:

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The Homeowners argue that these provisions, particularly subsection (b), "preserve" the right of a state to impose RF interference conditions because those conditions "protect the public safety and welfare." This argument is unavailing. The section at issue is contained in the statutory subchapter entitled "Common Carriers" and the part entitled "Development of Competitive Markets." The section concerns the provision of local telephone service and the impermissibility of state-created barriers to competitive

markets. It has nothing to do with RF interference. Moreover, the legislative history indicates that "[b]y 'public safety and welfare,' the Committee means, among other things, making certain that emergency services, such as 911, are available to the public." H.R. Rep. No. 104-204, at 75 (1995), reprinted in 1996 U.S.C.C.A.N. 10, at 41.

Third, the Homeowners argue that the FCC has expressly declined to regulate or to preempt local regulation of radio frequency matters affecting safety. They point to the following explanatory portions of an FCC proposed rule, and argue that it establishes that the FCC intended to preserve state and local regulations affecting health and safety:

> 164. In the past, parties have requested that the Commission preempt state and local authority over RF exposure matters. To date the Commission has declined to preempt on health and safety matters. However, the Commission has noted that should non-Federal RF radiation standards be adopted that adversely affect a licensee's ability to engage in Commission-authorized activities, the Commission would consider reconsidering whether Federal action is necessary.
>
> . . .
>
> 166. Decision. In the past the Commission has hesitated to intrude on the ability of states and localities to make regulations affecting health and safety. Many of the comments indicate that a patchwork of

> divergent local and State regulations could pose a burden on interstate communications However, since these comments were filed, Congress has passed the Telecommunications Act of 1996 Section 704 of the Telecommunications Act amends the Communications Act by providing for federal preemption of state and local regulation of personal wireless service facilities on the basis of RF environmental effects. The Telecommunications Act also provides for resolution of conflicts related to the regulation of RF emissions by the courts or by petition to the Commission. Accordingly, we are amending § 1.1307 of our rules to incorporate the provisions of Section 704 of the Telecommunications Act.

Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 58 Fed. Reg. 19,393 (1993) (codified at 47 C.F.R. pt. 1, 2, 15, 24, 97) (adopted Aug. 5, 1996) (footnotes omitted).

The Homeowners misunderstand the meaning of "health and safety" in this context. This term is used in conjunction with the term "environmental effects," which is not defined in the statute but most likely refers, to the already-existing requirement that the FCC prepare an Environmental Assessment in connection with the grant of a license. See 47 C.F.R. § 1.1307 (1998). The environmental effects specified by the regulations do not include RF interference, but rather focus on degradation of the natural environment, effects on historical landmarks, and the biological effects of RF

radiation. Consequently, the FCC's adoption or rejection of a position with respect to that issue has no relevance to the issue of RF interference.

We conclude that allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Fidelity Savings & Loan Ass'n, 458 U.S. at 152 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted), in delegating regulatory power to the FCC for uniform regulation of broadcast technologies. At least one other court has agreed with this view with respect to local zoning permits. See Southwestern Bell Wireless Inc. v. Board of County Commissioners, 199 F.3d 1185, 1193 (10th Cir. 1999). Other courts have reached the same conclusion when fazed with the question whether federal law preempts state common law nuisance actions purporting to regulate RF interference. See Broyde, 13 F.3d at 998; Still v. Michaels, 791 F. Supp. 248, 252 (D. Ariz. 1992) (alternate holding); Still v. Michaels, 803 P.2d 124, 125 (Ariz. Ct. App. 1990); Helm v. Louisville Corp., 667 S.W.2d 691, 693 (Ky. 1984); Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550, 556-57 (Minn. 1984); Smith v. Calvary Educational Broadcasting Network, 783 S.W.2d 533, 536-37 (Mo. Ct. App. 1990); Monfort v. Larson, 693 N.Y.S.2d 286, 289 (N.Y. App Div. 1999); Fetterman v. Green, 689 A.2d 289, 294 (Pa. Super. Ct.), appeal denied, 695 A.2d 786 (1997); cf. Goforth v. Smith, 991 S.W.2d 579, 583-84 (Ark. 1999) (state law action to remedy environmental effects of RF emissions preempted).

As the ZBA noted, see Notice of Decision at 2 n.2, preemption of the permit condition does not leave the Homeowners without a remedy. Federal regulations impose a continuing duty on WIZN to provide technical assistance to residents within the blanketing interference area to resolve RF interference problems. See 47 C.F.R. § 73.318(d) (1998). In the first year of any new or upgraded transmitter's operation, the transmitting station must satisfy all complaints of blanketing interference with most common devices at no cost to the complainant. See id. § 73.318(b). In addition, the Homeowners may file informal requests for action with the FCC. See id. § 1.41. They may also ask the FCC to deny renewal of WIZN's license on the ground that the interference is so severe that it violates the public interest. See 47 U.S.C. § 307(c)(1); Broyde, 13 F.3d at 998. Judicial review of FCC decisions and orders is available in the United States Court of Appeals for the District of Columbia Circuit. See 47 U.S.C. § 402(b).

III. Consequence of Preemption

The District Court ruled that, because local enforcement of the condition of WIZN's permit was preempted, the Court lacked subject matter jurisdiction. Though the Court lacked jurisdiction to grant any relief with respect to the Homeowners, claim to remedy the RF interference, it did not lack jurisdiction to rule, as it correctly did, that the permit condition was preempted and that any attempt to obtain a federal or state law remedy that regulates RF interference was preempted. Having made that ruling, the proper disposition in the removed case was to affirm the ruling of the ZBA, which had also ruled the permit condition preempted. Although the preemption issue was raised by

motions to dismiss pursuant to Rules 12(b) (1) and (6), the resolution of the issue in favor of the Appellees, after full consideration, left nothing further to be done on the federal issue, and at that point at least a partial summary judgment for the Appellees was warranted. We need not consider whether the state law issues should have been remanded to the Vermont Environmental Court, because the Homeowners have not sought that relief on this appeal. The only relief sought by the Homeowners in this Court is reversal of the District Court's preemption ruling.

Conclusion

For the foregoing reasons, the ruling of the District Court on the preemption issue is affirmed, and the judgment dismissing the removed case is modified to reflect that the decision of the ZBA the preemption issue is affirmed. The Appellees may recover their costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Filed September 8, 1997]

No. 2:96-CV-295

GRAEME AND MARY BETH FREEMAN, et at., *Appellants*,	)
v.	)
BURLINGTON BROADCASTERS, Inc., et al., *Appellees*.	)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, William Pinney, Jr., William Pinney, Sr., Rev. Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmod, Mark Musiel, Michael I. Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, and Barbara Sanford Farrell, plaintiffs, by and through their attorneys, Tarrant, Marks & Gillies of Montpelier, Vermont, pursuant to Rules 3 and 4(a)

(1) of the Federal Rules of Appellate Procedure, hereby appeal to the United States Court of Appeals for the Second Circuit from the Opinion and Order, Docket No. 2:96-CV-295, issued by the Honorable William K. Sessions, III, granting defendant's Motion to Dismiss entered in this action on August 8, 1997, with Judgment and Order dated August 11, 1997.

Dated at Montpelier, Vermont this 5th day of September, 1997.

APPELLANTS

By: /s/_____

Gerald R. Tarrant, Esq.
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05602
Federal Bar ID #000381706

Their Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

[Filed August 11, 1997]

No. 2:96-CV-295

GRAEME FREEMAN, et al,	)
Appellants,	)
	)
v.	)
	)
BURLINGTON	)
BROADCASTERS, INC. d/b/a	)
WIZN, CHARLOTTE FIRE AND	)
RESCUE SERVICES, INC.,	)
NYNEX MOBILE LIMITED	)
PARTNERSHIP 1, d/b/a Bell	)
Atlantic NYNEX Mobile,	)
Appellees.	)
	)

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order (Paper No. 34) filed August 11, 1997, appellee NYNEX Mobile Limited Partnership 1's motion to dismiss on the ground of lack of subject matter jurisdiction (Paper No. 14) is granted. JUDGMENT is hereby entered for appellees Burlington Broadcasters, Inc., Charlotte Fire and Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1, against the appellants.

Date: August 11, 1997

RICHARD PAUL WASKO
Clerk

/s/_____
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 8-1-97

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

[Filed August 11, 1997]

No. 2:96-CV-295

IN RE: APPEAL OF GRAEME)
and MARY BETH FREEMAN,)
ET AL.)
)

OPINION AND ORDER

This action is an appeal from a decision by the Town of Charlotte Zoning Board of Adjustment ("ZBA") finding that it had no jurisdiction to enforce its requirement that the users of a telecommunications tower remedy any radio frequency interference ("RFI") experienced by the residents of the town. The users of the tower, Burlington Broadcasters, Inc., d/b/a WIZN-FM ("WIZN"), NYNEX Mobile Limited Partnership 1 d/b/a Bell Atlantic NYNEX Mobile ("BANM"), and Charlotte Volunteer Fire and Rescue Services, Inc. ("CVFRS"), seek dismissal of the action on the grounds that the Federal Communications Commission ("FCC") has exclusive jurisdiction over complaints involving RFI.

I. Factual Background

WIZN operates an FM radio station and is licensed by the FCC to broadcast from an approximately 199 foot radio transmission tower on Pease Mountain in Charlotte, Vermont. BANM transmits cellular calls from four thirteen foot "whip" antennas mounted halfway up the tower. CVFRS makes intermittent use of the tower in connection with providing fire and ambulance service for the town.

In 1986 WIZN and CVFRS received zoning approval from the Town of Charlotte to build the Pease Mountain tower. At a hearing in connection with the zoning permit to build the tower, community residents raised concerns about RFI.[1] According to the minutes of the meeting, WIZN's representative, Michael Calhoun, stated that there would not be any interference, and if there was, WIZN would "trap it out." (paper 19, att. B). WIZN and CVFRS received approval to construct the tower, on the condition that "[a]ny interference with reception in homes in the area because WIZN begins broadcasting will be remedied by WIZN. WIZN will broadcast 50,000 watts per day." Id.

After the tower was built, WIZN conveyed ownership of the tower to CVFRS. In April 1987 WIZN began broadcasting from the tower. In 1991 BANM (formerly Contel Cellular) and CVFRS received zoning approval from

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[1] RFI arises when a signal radiated by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another signal or causes malfunction of the electronic device. H.R. Conf. Rep. No. 97-765, at 11 (1982), 1982 reprinted in U.S.C.C.A.N. 2261.

the ZBA to mount the whip antennas. The ZBA placed no conditions respecting RFI on the approval.

On April 5, 1996, the Charlotte Zoning Administrator issued a notice of violation to WIZN, BANM, CVFRS and the landowner. According to the notice, the operation of the broadcast facility had caused "long-term and continuous" interference with electronic devices and other appliances, in violation of the terms and conditions of ZBA approvals and permits, which required that any RFI would be remedied by the users.

WIZN, BANM, CVFRS, and the landowner appealed the notice of zoning violation to the ZBA. The ZBA conducted public hearings in May, 1996, pursuant to Vt. Stat. Ann. tit. 24, 4467 (Supp. 1996). A group of "interested persons" as defined in Vt. Stat. Ann. tit. 24, § 4464(b) (Supp. 1996) ("the Freemans" or "the Neighbors") appeared and were heard at these proceedings. At the hearings, Charlotte residents identified RFI problems with "various electrical and electronic devices, including but not limited to telephones, answering machines, radios, stereos and tape machines, public address systems, televisions and VCRs, baby monitors, computers and security systems." Notice of Decision at 4 (paper 1, att. 2).

On July 11, 1996 the ZBA issued its Notice of Decision. The ZBA found "that WIZN has caused continuous and widespread RFI that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and proper." Id. It found no credible evidence that CVFRS, BANM or the landowner had caused RFI in Charlotte.

The ZBA concluded that WIZN had violated the terms of its conditional use approval and of its zoning permit. It concluded further, however, that the FCC has exclusive jurisdiction over RFI phenomena, and that the ZBA had no authority to enforce a permit condition requiring WIZN to remedy any interference problems. Accordingly, it dismissed the Notice of Violation.

The Neighbors appealed the ZBA decision to the Vermont Environmental Court pursuant to Vt. Stat. Ann. tit. 24 § 4471 (Supp. 1996). They raised the following issues on appeal: whether federal law preempts state and local jurisdiction over RFI; whether BANM or CVFRS caused RFI in Charlotte; whether BANM and CVFRS, as co-permittees of WIZN, bore responsibility for WIZN's permit violations; whether there is state of local jurisdiction over an allegation of fraud, deceit or misrepresentation; and whether Charlotte residents have been denied their rights as consumers.

WIZN, BANM, CVFRS and the landowner removed the case to this Court, asserting that the case concerned a claim arising under the Federal Communication Act of 1934 (as amended) ("FCA"), 47 U.S.C. §§ 151-613 (1991 and Supp. 1997).

Before the Court are WIZN's motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6) (paper 13), and BANM's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b) (6) (paper 14).[2] Specifically, WIZN and BANM contend that the Federal Communications Act preempts the

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[2] CVFRS has joined in both motions (paper 16).

Neighbors' zoning appeal. The Neighbors oppose the dismissal, and seek a remand to the ZBA.[3]

II. Discussion

A. Subject matter jurisdiction standard

BANM has challenged this Court's subject matter jurisdiction over this zoning appeal. In ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(1), the allegations of the complaint are to be construed favorably to the pleader. The issue is not whether claimants will ultimately prevail, but whether they are entitled to offer evidence to support their claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). For the purposes of this motion to dismiss, therefore, the Court accepts the Neighbors' factual allegations as true.

Congressional intent is the "ultimate touchstone" of preemption analysis. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). That intent may be

> explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is preempted if that law actually conflicts with

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[3] The Town of Charlotte opposed the dismissal as well, but has orally sought and received this Court's permission to withdraw from the case. Consequently its opposition is moot.

> federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Id. (citations omitted).

The Federal Communications Act of 1934 (as amended) does not contain an express provision preempting state or local regulation of radio frequency interference. Therefore, to determine whether preemption is implied, the Court must analyze whether Charlotte's zoning permit condition actually conflicts with federal law, or if federal law occupies the field of radio frequency interference so thoroughly that state or local regulation is precluded.

In enacting the Communications Act of 1934, Congress created a "unified and comprehensive regulatory system" for the broadcasting industry. National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943). In Section 301 of the Act, Congress stated that the purpose of Act was "among other things, to maintain the control of the United States over all the channels of radio transmission." 47 U.S.C. § 301 (1991) .

In Section 151 of the Act, Congress created the FCC to "execute and enforce the provisions" of the Act. 47 U.S.C. § 151 (Supp. 1997). Congress endowed the FCC with "comprehensive powers to promote and realize the vast potentialities of radio." National Broadcasting, 319 U.S. at 217. The Supreme Court made clear in National Broadcasting that the Commission is empowered to deal with "technical and engineering impediments" to the "effective use of radio in the

public interest." Id. See also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) (Communications Act expressed Congress's desire to maintain, through administrative control, grip on dynamic aspects of radio transmission); Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 430, n. 6 (1963) (FCC's jurisdiction over technical matters associated with transmission of radio signals is clearly exclusive).

The FCC has been given statutory authority to regulate the transmission of radio energy that creates interference in 43 U.S.C. § 301, § 302a(1), and § 303(c), (d), (e) and (f) (1991 and Supp. 1997). The Neighbors argue, however, that their complaints of RFI have interfered with business and institutional equipment in the town, and that the ZBA has the authority under 47 U.S.C. § 302a (1991) to regulate RFI that affects business and institutional electronic devices as opposed to home electronic devices.

Section 302a(a) (2) of Title 47 of the United States Code authorizes the FCC to make reasonable regulations "establishing minimum performance standards for home electronic equipment and Systems to reduce their susceptibility to interference" from RFI. Section 302a(a)(1) authorizes the FCC to regulate any devices which are capable of transmitting radio frequency energy which could harm radio communications. The statute does not authorize the FCC to establish performance standards for commercial and business electronic equipment. From this statutory silence, the Neighbors have inferred that the regulation of RFI which affects commercial and business electronic equipment is within the purview of state and local authorities. Section 302a does not purport to regulate radio stations which may produce

interference, however, but only to regulate devices which interfere with radio reception or home electronic devices which are susceptible to RFI.

Although Congress has not enacted a specific statute that explicitly authorizes the FCC to regulate radio station RFI that affects business and commercial electronic devices, it clearly intends that the FCC have exclusive jurisdiction over RFI in general. With the enactment of the Communications Amendments Act of 1982, which amended § 302a to provide for the establishment of performance standards for home electronic equipment, Congress clarified that the FCC had the power to regulate not only the transmitters of RFI, but the devices in the home that are susceptible to RFI. The House Conference Report which accompanied the Communications Amendments Act of 1982 clarified that "exclusive jurisdiction over RFI incidents (including preemption of state and local regulation of such phenomena) lies with the FCC." H.R. Conf. Rep. No. 97-765, at 16 (1982), reprinted in 1982 U.S.C.C.A.N. 2261. It stated further that

> [s]uch matters [involving RFI] shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI

> phenomena shall be imposed only by the Commission.

Id. at 40, 1982 U.S.C.C.A.N. at 2277.

Section 302a does not, expressly or by implication, authorize state or local regulation of the source of radio frequency interference. And although Congress limited the FCC to establishing performance standards for home electronic devices instead of for all electronic devices which might be susceptible to RFI,[4] it emphasized that all RFI complaints were to be handled through the Commission.

The Neighbors also claim that Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c) (7) (Supp. 1997), preserved the ZBA's authority to make and enforce conditions regulating RFI with respect to BANM's provision of cellular telephone service. Section 332 of Title 47 deals with the provision of commercial mobile services. In 1996 the section was amended specifically to prevent FCC preemption of local and state land use decisions regarding the placement, construction, and modification of personal wireless service facilities. Telecommunications Act of 1996 ("TCA"), Section 704, 47 U.S.C. § 332(c)(7).

The Zoning Administrator's Notice of Violation and the ZBA's subsequent findings are not local land use decisions

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[4] The House Conference Report noted that devices designed and marketed for use in a commercial environment normally included protection against RFI, and did not require FCC regulation. H.R. Conf. Rep. No. 97765, at 38 (1982).

regarding the placement, construction, and modification of wireless facilities. The original approval of the application to install BANM's whip antennas was not appealed. No application or request to modify BANM's permit has been made. The Zoning Administrator found BANM in violation of its permit on the basis of excessive RFI; the ZBA subsequently found that BANM neither contributed to the RFI problem in Charlotte, nor was responsible as a co-permittee for WIZN's RFI. Because the decisions by the local zoning authorities do not concern the placement, construction or modification of a wireless service facility, § 332(c)(7)'s limit on FCC preemption is not implicated.

Even if the ZBA proceedings did involve placement, construction or modification of wireless facilities, 332(c)(7) does not authorize state or local regulation of radio frequency interference. Under this subsection, state and local regulation of personal wireless service facilities with respect to the environmental effects of radio frequency emissions is preempted. 47 U.S.C. § 332(c) (7) (B) (iv). The statute is silent as to the ability of state or local authorities to regulate with respect to radio frequency interference. Section 601 of the TCA, however, provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152 (note) (Supp. 1997).

In the absence of an express provision allowing state and local authorities to regulate with respect to radio frequency interference, the TCA cannot be construed to permit such regulation, given the FCC's pervasive regulation in this area. See e.g. 47 C.F.R. § 21.902 (1997); 47 C.F.R.

§ 73.318 (1997); 47 C.F.R. § 101.103 (1997). Moreover, according to the legislative history of the TCA, the limitations on the FCC's jurisdiction are intended to relate strictly to local land use regulations, and are not intended to limit or affect the FCC's general authority over radio telecommunications. S. Rep. No. 104-230, at 462 (1996). Section 332 thus does not, expressly or by implication, authorize state or local regulation of radio frequency interference which may be produced by cellular telecommunications facilities.

An unreported decision from a district court of this Circuit has held on similar facts that a zoning board may not regulate radio interference, either by imposing restrictions or conditions related to RFI in a zoning permit, or by revoking the permit because of excessive RFI. The district court concluded that Congress intended to maintain exclusive jurisdiction over RFI phenomena, and to assign regulatory responsibility to the FCC. Great Lakes Wireless Talking Machine Co. v. Hayes, No. CIV-91-6140T, slip op. at 9 (W.D.N.Y. Jun. 25, 1991).

Case law from other jurisdictions supports the conclusion that the FCC has exclusive jurisdiction over complaints involving radio frequency interference. In Broyde v. Gotham Tower, Inc., 13 F.3d 994 (6th Cir.), cert. denied, 511 U.S. 1128 (1994), the Sixth Circuit affirmed the dismissal of a nuisance suit brought by area residents claiming that defendants' radio signals interfered with the operation of their home electronic equipment. The Court held that radio signal interference fell within the FCC's exclusive jurisdiction over technical matters associated with the transmission of radio signals. Id., at 997.

In Still v. Michaels, 791 F. Supp. 248 (D. Ariz. 1992), neighbors of a ham radio operator brought a nuisance suit claiming radio and television reception interference as a result of the radio transmissions. In dismissing the case for lack of subject matter jurisdiction, the district court ruled that nuisance actions involving RFI are preempted by the FCA, and that RFI matters are exclusively regulated by the FCC. Id., at 252-53.

In Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984), the Supreme Court of Minnesota affirmed the dismissal of a nuisance suit against radio stations on the ground that their claims were preempted by the FCA's delegation to the FCC of exclusive jurisdiction over the regulation of RFI. Id., at 556. See also Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691 (Ky. 1984) (affording relief from RFI would involve prohibiting or controlling radio transmissions, a matter within the exclusive jurisdiction of the FCC); Fetterman v. Green, 689 A.2d 289 (Pa. Super.), appeal denied, 695 A.2d 786 (Jun. 17, 1997) (FCA preempts common law claims involving RFI); Still v. Michaels, 803 P.2d 124 (Ariz. App. 1990) review denied (1991) (FCC regulation of RFI is exclusive, precluding nuisance action); Smith v. Calvary; Educ. Broadcasting Network, 783 S.W.2d 533 (Mo. App. 1990) (court lacks subject matter jurisdiction over suit to enjoin radio station operator from causing RFI to electrical and electronic appliances in plaintiffs' homes and businesses).

In cases involving challenges to local zoning ordinances or permit conditions which would regulate RFI, the FCC has ruled that it has exclusive jurisdiction over RFI. See, In re Mobilecomm of New York, Inc., 2 F.C.C.R. 5519

(1987) (local zoning ordinance regulating RFI in radio paging facility conflicts with federal regulatory scheme); In re 960 Radio, Inc., FCC 85-578 (Nov. 4, 1985) 1985 WL 193883 (local zoning board preempted from imposing requirement on FM radio station that it not cause RFI to existing facilities).

Examination of the Federal Communications Act, the legislative history and case law compels the conclusion that the FCC has exclusive jurisdiction over complaints involving radio frequency interference, whether they are cast as nuisance actions or zoning violations, and whether the complaints involve interference with computers in the home or computers at work. The Neighbors must bring their claims of radio frequency interference to the FCC.

The Neighbors have argued that their claim has to do with the proper siting of a broadcasting facility pursuant to the town's zoning laws. The issue of whether the tower was sited in compliance with the town's zoning regulations (apart from the ZBA's condition requiring remediation of RFI) was not raised in the Notice of Violation, the Notice of Decision or the Neighbors' Statement of Questions presented on their appeal of the ZBA's decision, and is thus not before this court.

The Neighbors have further argued that they have made claims of fraud and deceit which are not preempted. The sole issue raised by the Zoning Administrator, and appealed to the ZBA, was whether the permittees were in violation of the terms and conditions of their permits, specifically a requirement that they remedy any RFI. Assuming that the permittees did obtain their permits by means of fraud and deception, if the remedy sought is

elimination of RFI, state and local jurisdiction is preempted. Assuming that the Neighbors have standing to seek some other relief, such as revocation of the zoning permits, under theories of fraud and deceit, these claims were not part of the proceeding from which they appealed, and are not properly before this Court. Such claims, were they made, would not arise under the Federal Communications Act for purposes of removal jurisdiction under 28 U.S.C. § 1441(b). Claims of fraud or deceit in connection with the zoning permit process may be brought before the appropriate state or local jurisdiction.

III. Conclusion

BANM's Motion to Dismiss (paper 14) is GRANTED on the ground of lack of subject matter jurisdiction. WIZN's Motion to Dismiss (paper 13) is DENIED as moot.

Dated at Burlington, Vermont this 8th day of August, 1997.

/s/_____
William K. Sessions, III
United States District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

[Dated July 17, 1997]

No. 96-295

GRAEME FREEMAN, et al.	)
	)
v.	)
	)
BURLINGTON BROADCASTERS, INC., d/b/a/ WIZN, et al	)
	)

MOTIONS TO DISMISS

Thursday, July 17, 1997
Burlington, Vermont

BEFORE:
THE HONORABLE WILLIAM K. SESSIONS III
District Judge

THURSDAY, JULY 17, 1997

(The following took place in open court at 2:45 p.m.)

COURTROOM DEPUTY: This is civil number 96-295, Graeme Freeman, et al., versus Burlington Broadcasters Incorporated, et al. Present in the Courtroom on behalf of the plaintiffs is attorney Gerald Tarrant. Also present in the courtroom on behalf of the defendants are attorneys John Cain, Thomas Heilmann, and Brian Sullivan. The matter before the Court is a hearing on pending motions to dismiss.

THE COURT: All right. I promise to try not to confuse this hearing with the one I just finished. Wouldn't make you nervous, by the way, coming into the courtroom, having heard the last hearing, would it?

MR. TARRANT: A little.

THE COURT: Let's see, first I would like to start with a statement. In reviewing all of the pleadings here, I notice that the opinion from the board of zoning adjustment in Charlotte was signed by a person named Jonathan Fisher. I quite frankly didn't recognize -- I didn't look at this until just getting into the hearing today, in preparation for the hearing, and noticed that he was the chair of that committee. I have known him, I have probably -- I don't know him well. I don't think we have ever socialized, but I have known him over a number of year's and probably seen him on six occasions, I would guess, five or six occasions. Basically I know him but I don't know him well. So I thought I should disclose that on the record. And quite frankly, I don't think that has any impact whatsoever on my judgment here.

Second, I also noticed today that the Town of Charlotte was not noticed of this hearing. And I think we can still proceed, but they were not noticed and they have not -

obviously did not appear here. They have rendered -- they have submitted a pleading, a memorandum, in regard to the motion to dismiss, and I think we will contact them and afford them an opportunity to make an argument, if they wish to make a supplemental argument, but I would like to go forward with today's hearing.

HOLLY FORNIER: My name is Holly Fornier and I am on the Charlotte select board, and we decided not to participate any further in any legal avenues related to this -- to the Burlington Broadcasters issue.

THE COURT: Oh, you have?

HOLLY FORNIER: Yeah, we have decided not to be involved any longer.

THE COURT: All right.

HOLLY FORNIER: So that's why -- but the board was aware, the select board was aware of this meeting, and -- but we've advised the town attorney not to participate any longer.

THE COURT: Okay. The town attorney is actually supposed to contact the court and notify the court that he is withdrawing or --

HOLLY FORNIER: Okay.

THE COURT: -- the Town is withdrawing from this action. I appreciate that. So rather than have him come and argue to the Court, perhaps he can just withdraw -

HOLLY FORNIER: Okay.

THE COURT: -- your appearance. All right. Are we ready to proceed? Mr. Cain has filed a motion to dismiss.

MR. CAIN: Your Honor, on our side, we tried to arrange things to be in coherent order.

THE COURT: In a coherent order?

MR. CAIN: Well, we are trying, your Honor, and Brian Sullivan, if the Court please, would like to lead off.

THE COURT: All right.

MR. CAIN: Thank you.

THE COURT: Does this mean I go right to left?

MR. CAIN: Something like that.

MR. SULLIVAN: Not that coherent yet. Brian Sullivan, on behalf of Bell Atlantic Nynex Mobile, one-of the appellees in this action.

This action, as the Court is aware, concerns complaints raised by the appellants concerning radio frequency interference, which I will refer to as RFI. RFI is alleged to be caused by an FCC licensed transmitting source. That is the only issue that's before the Court today, the motion to dismiss concerning who has jurisdiction over RFI complaints against transmitting sources.

RFI has two components, and as the Court will see, distinguishing between the two is crucial to this motion to dismiss. First of all, RFI requires a transmitter that emits radio signals that cause interference, which I think is obvious. Less obviously, though, RFI requires a device that can receive those signals. And when we get to the 1982 amendments to the Federal Communications Act, that distinction will become important. For now, suffice it to say that every court that's ever looked at the issue has ruled that only the Federal Communications Commission has jurisdiction over RFI complaints against transmitting sources.

The cases that we cite in our briefs are unanimous on that point. And that follows from other case law where United States Supreme Court and lower courts have ruled that Congress intended that the FCC would have sole authority over the technical aspects of radio communications, RFI from transmitters being one of those technical aspects.

Therefore, because of that exclusive jurisdiction, any effort to bring an action in the state or local forum has to be preempted, and for that reason, this motion should be dismissed.

THE COURT: What you are suggesting is that if the action that is filed with the town seeks to regulate in any way those transmission -- that transmission facility, the transmission of the radio frequency interruption -- not interruptions, but -

MR. SULLIVAN: Interference, actually the signals that cause the -- to be precise.

THE COURT: Right. If there is an effort to actually directly prohibit those, or restrict those, then that is preempted

MR. SULLIVAN: Yes.

THE COURT: My question goes beyond that, though. Let us say, and actually get to the heart of it, there's a fraud claim made by the plaintiffs in this particular case, that is that the actual tower back in 1987 was constructed as a result of a permit which was obtained by way of fraudulent representations. If that were in fact true, if that were actually at issue, does the town have the power to wipe out the permit completely?

MR. SULLIVAN: First of all, your Honor, I think it's important to say that that is not at issue in this case because that was never before the zoning board, could not be before the zoning board.

THE COURT: I was going to ask the other side that question, but -

MR. SULLIVAN: Okay.

THE COURT: -- this is just an intellectual question for you.

MR. SULLIVAN: Hypothetically, I believe that there is an avenue for state relief for fraud, even though there is RFI alleged. But the proper avenue would be to file an action in superior court alleging fraud. I don't think the zoning board has jurisdiction for issuer of fraud, not because of

federal preemption, but because that's beyond their powers as a zoning board.

THE COURT: I mean, you had represented -- well, guess actually Mr. Cain had represented in his pleading, as I recall, that the plaintiff had the power to go to the FCC to resolve this particular issue. If in fact there's a claim, a fraud claim, you are now suggesting that also the plaintiffs would have the option to go to superior court to try to basically remove the permit in the first place, that is remove the tower.

MR. SULLIVAN: I am not sure what exactly the superior court could order. But I think it's pretty clear that they could attempt to bring a claim in superior court for fraud. It would have to comply with the special pleading requirements for fraud.

THE COURT: Sure.

MR. SULLIVAN: Again, on the facts of this case I don't think they can state a claim, but hypothetically, that avenue is available.

THE COURT: All right.

MR. SULLIVAN: Just in quick summary fashion, we have outlined the history of the FCC's jurisdiction over RFI in our reply brief. I think that speaks for itself. The courts were developing this law all the way up until the 1970s. Watershed occurred in 1982, when Congress amended the communications act, and again, I think our briefing is pretty clear, the legislative history of that amendment shows that, contrary to the appellants' assertions, the amendment meant

to broaden the FCC's authority, and in fact every court that's looked at that amendment since has upheld that as well.

Before the 1982 amendment, it was clear that the FCC had sole authority over all transmitting complaints of RFI. In '82, Congress also gave them authority over RFI problems caused by receiving devices, but only consumer-receiving devices, and the legislative history is very clear that the reason for that is because the manufacturers of the consumer devices were not building their equipment to sufficient standards.

They tried voluntary regulation. It didn't work. Congress decided they were going to impose regulations for consumer devices but not for commercial, and I think the perhaps fatal flaw in the appellants' argument is failing to recognize, first of all, the distinction between regulating the transmitter and regulating the receiving device, number one; and number two, confusion between Congress's attempt to broaden the FCC's jurisdiction versus Congress's statements about an area where jurisdiction was already clear.

THE COURT: Is the distinction between the transmitting and the receiving devices really that significant? Let me just give you -- let me give you my personal experience prior to being -- prior to being a judge.

I was a lawyer in Middlebury, and we had a particular radio frequency interference problem, and that is whenever we would go to the bathroom, flush the toilet, out came WFAD - sorry -- vibrated the pipes.

MR. SULLIVAN: I heard interference from toasters, but this is a first.

THE COURT: So who do you complain to?

MR. SULLIVAN: Well, you complain to the FCC and you can do it in a couple of different ways. One is to file a complaint and the other is to monitor the station's licensing process, because it has to be renewed periodically, and to intervene in that process, to become a petitioner in that process.

THE COURT: But then it could very well say then, if you are really focusing in upon the receiving end then, I theoretically got a problem with the pipes that seem to be hooked into WFAD whenever we flush a toilet.

MR. SULLIVAN: I suppose there could be a cause of action for some kind of product liability claim against the manufacturer of the pipe. Without being too facetious if there is a commercial receiving device that is not being built properly and is not rejecting the unwanted interference, I believe that the state of the law allows the party receiving the interference to sue that company.

They couldn't sue for a commercial -- or a consumer device because that's preempted by the FCC. But if you have business equipment that is just not doing its job, rejecting these radio signals, I think you could maintain a cause of action against the manufacturer.

THE COURT: All right. Ever since I started reading about this case, I really wanted to find out what the ultimate solution was to the bathroom pipes.

MR. SULLIVAN: Well, I think it's interesting that in -- in the Broyde case, which is the leading case we cite, the court recites some of the remedies that are available, and it talks about the FCC process, and it also points out, as did the Charlotte zoning board, that the culmination of that is an appeal to the United States Court of Appeals for the federal circuit, I believe, or D.C. Circuit.

THE COURT: D.C. Circuit

MR. SULLIVAN: Yes. So there's not only administrative relief, there's judicial review of that relief as well.

Basically I'd just like to close and let John Cain pick up with some of the case law by talking briefly about the further amendments made to the communications act in 1996. This is what's called the Telecommunications Act. The appellants have attempted to argue that that somehow undoes this body of law, and I think they'd have to concede that there's nothing in the Telecommunications Act that says that. So any argument they are making about repeal has to be an implied repeal.

The problem they run into there is section 601 of the act forbids implied repeal, number one. Number two, the section that they are relying upon, section 704, only preserves existing local zoning authority. And we have pointed to the basic definition of preserved, maintaining something that

already exists. Well, there was no local zoning authority before 1996 over RFI transmissions. There was nothing to preserve.

And then finally, we, just as background, attached a couple letters from the chairman of the FCC, showing how that agency interprets its authority. And those letters were written after the '96 act became effective, and show that the FCC still believes that it has complete authority over RFI.

THE COURT: But there is no case law after 1996 law, indicating that there has been a waiver of the preemption?

MR. SULLIVAN: Exactly, your Honor. In fact, there was one case that we sent to the Court, in a supplemental file --

THE COURT: The New Jersey case?

MR. SULLIVAN: Pennsylvania, I believe. Fetterman versus Green.

THE COURT: I thought it was New Jersey. But it was relatively geographically close.

MR. SULLIVAN: And it was decided in early '97. So if there was any change in the law caused by the '96 act, it was not apparent to that court.

THE COURT: Okay.

MR. SULLIVAN: Thank you, your Honor.

THE COURT: All right, Mr. Cain?

MR. CAIN: Thank you, your Honor.

THE COURT: By the way, I did lose control there with laughter at the thought of the -- and I didn't mean to be facetious.

MR. CAIN: Morning, your Honor. I am John Cain representing Burlington Broadcasters. And WIZN does business and we are licensed and regulated by the Federal Communication Commission, and in this particular motion, I was looking through the materials last week, and I -- we have tried, Mr. Tarrant and Mr. Allen and Mr. Sullivan, we really tried to do as good a job as we can to brief as exhaustively as we could the entire matter, and I really think that the entire subject of our motion here has been laid out in the briefs, and we have tried to give the Court every single case that's been decided in this area.

THE COURT: All right. I am curious a little bit about the facts because there was some representation as to Calhoun. I think Michael Calhoun was the head of your company.

MR. CAIN: He was the station manager.

THE COURT: Station manager.

MR. CAIN: Yes.

THE COURT: At the time when the 1987 -- when this was constructed, and apparently made this representation that no way was there going to be any interference.

MR. CAIN: Right.

THE COURT: Factually is that accurate?

MR. CAIN: Yes. He did make that representation. After he made the representation, a number of people, including all of the plaintiffs, moved to the tower, and there have been what we call RFI, people have experienced RFI, and in conjunction with that particular topic, I would invite the Court to look at Great Lakes, which I sent in, which is factually identical to this case, including the fact that one of the representatives of the radio station made representations about getting rid of the RFI.

And as I said, the issue here is whether the Charlotte zoning board is preempted from regulating RFI under the Federal Communications Act. And I would like the Court to - I would like to emphasize to the Court that every single case that has been decided here has indicated that there is total preemption of local or state regulation of RFI.

We have state cases, we have federal cases, we have one that went up to the circuit court of appeals, cert. denied by the Supreme Court, and I also sent in two cases from the Federal Communications Commission, which have the same result.

As I indicated -

THE COURT: And I just received one from the District Four Environmental Commission, as I recall, on this particular issue.

MR. CAIN: Right, and Mr. Tarrant, on behalf of the neighbors, had a couple of arguments or defenses to preemption. His latest one is that business institution - institutional and medical equipment is not preempted. And he tried that argument with the district environmental board and they, in a relatively short opinion, indicated that they rejected that argument.

THE COURT: He has raised that in this case.

MR. CAIN: He brought it over to this case, yes.

THE COURT: Right.

MR. CAIN: But I would like to point out that even with the knew argument -

THE COURT: Let's go back, going beyond the state cases and the federal cases, to the opinion -- the higher opinion of fairness, what happens if a -- a person's going to construct a device like this, comes to a town, gets the permit by making false representations; shouldn't the town have some sort of way to cure the wrong, because they were basically defrauded?

MR. CAIN: Well, I don't know if that's accurate because, as I said, about the complaining plaintiffs here, all moved to the tower. At the time the tower went up, the representations were made, and we did try to track out

whatever RFI were there. Now these people moved to the tower. They were having interference. They do have a remedy. They can go to the Federal Communication Commission. They can participate in our licensing proceeding which is going to take place at the end of the year.

THE COURT: They have responded by suggesting that if you go to the FCC, there are no standards. The FCC standards aren't applicable to these particular devices that are becoming defective.

MR. CAIN: Congress indicated that there were going to be certain rules which radio stations had to adhere to, and we are going to adhere to them. And if you look at Fetterman, they talked about, well, what if there is no remedy, and the court said, even if there is no remedy, there's still no jurisdiction.

THE COURT: I guess my question is there no remedy? I have raised the question a second ago, in the fraud action, bring it in superior court. If they decide to bring an action to invalidate, I'm not so sure you would even say the permit, but you could invalidate the construction of the antenna, based upon the fact that they were -- the permits were fraudulently obtained, do they have -- can they do that? Or is that preempted by the federal government as well?

MR. CAIN: The Town of Charlotte cannot bring the - some type of fraud action, I don't believe the way you are talking. I don't want to do the creative legal work for the plaintiffs -

THE COURT: No, right. I -

MR. CAIN: -- but I would imagine that there would be instances in which they could start some kind of fraud action in superior court.

THE COURT: But the reason I bring this up, actually, is because you actually raised the question about they have other alternatives. They can go to FCC. Then they respond they can't go to FCC. And then I started to think if there's a fraud action here, if in fact this was constructed as a result of fraudulent -- fraudulent representations made by WIZN or -- or whomever, could in fact the construction be negated?

MR. CAIN: Not here. Okay. And they -- we do not agree that there is no remedy. I want to make sure you understand that. We don't agree there was fraud. They have started another action in which they have claimed that we fraudulently put the antenna in the wrong place. So they do have other remedies and they are taking that action in another forum.

THE COURT: Which forum is that?

MR. CAIN: We're in environmental -

THE COURT: I -

MR. CAIN: I beg your pardon?

THE COURT: Environmental court?

MR. CAIN: Yes.

THE COURT: Vermont District Court?

MR. CAIN: Yes. We went to the zoning board and we are now up to the environmental court.

THE COURT: All right.

MR. CAIN: And we have not alleged nor are we going to that there is preemption in that matter. So they are getting their -- going ahead with their remedy.

THE COURT: So they have avenues to resolve their claims. I wonder if there's any efforts made on behalf of your clients, as well as the other parties here, to try to resolve this problem.

MR. CAIN: We have tried. We have hired an engineer to go out to the people's houses. I mean, you can talk to some of the plaintiffs here. We have been out to their houses a number of times and we have tried to resolve the problems that they have.

As Brian pointed out, one of the problems is when you buy cheap consumer devices, sometimes they're not made to reject RFI the way the commercial products are.

THE COURT: All right.

MR. CAIN: Anyway, as I said, I would invite the Court's attention to particularly the Great Lakes case, which is factually identical to the case that we have here. Procedurally to the Broyde case -

THE COURT: It's Western District of New York?

MR. CAIN: Yes. Eastern district, I believe, but yes.

THE COURT: I thought it was western district.

MR. CAIN: Well, it's the district court out there.

THE COURT: Great Lakes actually probably indicates that it's toward Buffalo, I would think so. That would be western district.

MR. CAIN: Anyway, I would like to close, but I would like to rest on our briefs, and I would ask the Court to --

THE COURT: Briefs are excellent, by the way.

MR. SULLIVAN: Thank you. Your Honor, if I could just have one second before Tom starts. I think there is a bit of a misunderstanding on the FCC licensing procedure. Even though some of these consumer devices are more or less immune from action because of what the FCC has done, it doesn't mean that the operator of the transmitter is immune.

One of the things that's looked at when they apply to renew their license is how responsive they have been to RFI complaints. And if they just say, well, the one-year period where we have to be financially responsible for RFI is up, too bad, then they're not going to get their license renewed, and that happened in the case of -- I believe it's Smith versus Calvary Broadcasting.

The broadcasting company did prevail on the preemption argument in court and then got its license pulled before the FCC because it wasn't responsive.

THE COURT: Okay. Mr. Heilmann?

MR. HEILMANN: Just want to be very brief, your Honor. Charlotte Fire and Rescue Services owns the physical structure that these transmitters are placed upon, so I don't think the claim here is that the tower itself is causing the radio frequency interference. It's the transmitting devices. There are three. One is the band of Nynex, the other is the WIZN transmitter, and the other is the broadcast transmitter that the fire and rescue service maintains for its purposes. To the extent that we do transmission, we also have FCC licenses, and therefore think we come within the same case law that relates to the arguments --

THE COURT: Have there been any efforts made to determining what the source of the RFIs, at least in respect to all three of these transmitting devices?

MR. HEILMANN: I think there have been.

THE COURT: Any solution? There have been efforts, but any -- any solution? Do you know which one is causing the problem or -

MR. HEILMANN: As far as we can tell, the -- the transmitter operated by WIZN, which is a much larger transmitter of course, is the source of whatever this RFI phenomenon is. We think it's quite clear that the very modest and intermittent broadcasting done by fire and rescue services,

to keep their personnel aware of emergency situations, is not the source of RFI.

We think it's also clear that the BANM transmissions, even at their maximum and continuous outputings, they are also intermittent transmitters, is not the source of the difficulty, but to the extent that there is this RFI issue, we think they're covered by the case law.

One further point, you mentioned the question of fraud, and certainly there -- I don't think the fraud assertions are directed against the fire and rescue services transmitter. It's the other transmitter, the WIZN transmitter that's involved. And I don't want to leave it suggesting that the fraud case is an open and shut case.

There are decisions decided by our Vermont Supreme Court under the zoning -- under the planning and zoning statutes in Vermont indicating that even if misrepresentations were used to obtain local permits, there has to be timely appeals from those permits. And I am not here to argue that point because you don't have that claim directly before you.

THE COURT: The reason I bring that up, quite frankly, is because it was raised by Mr. Tarrant, and I was not sure, and now I am fairly certain, as to whether that issue was ever raised before the zoning administrator because I am basically dealing with an appeal from the board of zoning adjustment. If it wasn't raised, it's not to be resolved. So that basically the fraud claim is not significant, in regard to this particular litigation.

But then also it's been raised in Mr. Cain's pleading, as I recall, that there are other alternatives, other remedies that -- that the appellants can seek in this particular case, and I was interested to know whether that's one, whether in fact there's a federal preemption in regard to a fraud claim which would necessarily impact on RFIs. And I think you are suggesting that, or at least it has been suggested, that there's still local or state jurisdiction over that particular issue.

MR. HEILMANN: Over common law misrepresentation and fraud, certainly.

THE COURT: Even though -- even though if, in enforcing a judgment, let's say, against WIZN, it necessarily would impact upon RFIs, because of course might result in, you know, the transmitting device being removed.

MR. HEILMANN: Certain defenses, but the threshold question, and the threshold proposition we agree with.

THE COURT: All right. All right, Mr. Tarrant? And gain, I didn't mean to make light of the RFI problem.

MR. TARRANT: No, you did not, your Honor. Or if you did, it was amusing, and we understand that.

THE COURT: I hopefully didn't spend a whole lot of time listening to it in the bathroom.

MR. TARRANT: My name is Gerald Tarrant and I represent the appellants in this case, 22 neighbors and residents of the town.

This is a -- a matter that is of importance, perhaps not of the same magnitude that you initially heard this afternoon in another case, but it affects these people's lives and it has affected their lives for the last 10 years.

Yes, it has affected their personal life in terms of residential issues, but more importantly, and the reason we are here today and the primary argument that we are advancing, is that it has affected many of the businesses, including businesses within their homes, businesses within the town.

It has led to at least one business closing. It has led to a veterinarian not being able to rely on her medical equipment. It has led to consultants, stockbrokers, not being able to rely on their computers, the fax machines, anything that they use. IBM people who come home and cannot rely on business equipment.

THE COURT: Let me just raise a question that was raised by, in my mind, by the other side. I had thought that there had been 26 complaints that had been filed with WIZN within a relatively short period of time after construction of the tower, and I think they just suggested that the -- that your clients moved to the area of the tower after its construction.

MR. TARRANT: Some did, some did not.

THE COURT: So some were there?

MR. TARRANT: Some were there. Many were there.

THE COURT: I don't know where -- it's on Pease Mountain, but I don't know where Pease Mountain is.

MR. TARRANT: Well, as you go along Route 7 and you come to Charlotte, at the blinking light, or maybe it's a red light now, up on the mountain on the left there's an antenna, you will see the tower and the antenna. That's Pease Mountain. As you are going south, you will see it there.

THE COURT: All right.

MR. TARRANT: Yes, some people did, but clearly any statement that all of the plaintiffs moved into the town or moved into their homes or businesses after the tower is up is categorically wrong and we deny that.

I want to emphasize, this is a major impact because it has taken many of their livelihoods away from them. They cannot rely on their equipment. One of my clients has moved. Another has closed his business. Another is hobbling along. The school has significant impacts on all of their computers. They freeze up. Over $400,000 worth of investment. They are -- have been involved in this. The church cannot rely on its equipment. These are issues that go beyond household equipment.

Our case centers on the fact that the Congress, in 1982, elected not to advance or delegate authority to the FCC with respect to office or business equipment. That is set forth in the legislation. That is set forth in the primary section of the code, section 302(a) dealing with interference.

There are several other sections that talk about interference. They simply list interference, or interference between broadcasting stations or between FM stations. There are also sections that deal with interference, I believe, with ships. But with respect to the issue at hand, this case begins and ends at section 302(a).

THE COURT: But when -- and when you are talking about 302(a), was not Congress in fact dealing with problems in the interruption of radio transmissions from either consumer goods versus business goods, and they just sort of assumed that -- in fact isn't there -- aren't there minutes to the congressional hearings, in which they just assumed that products that are made for professional or business purposes are solid enough, they would not create a problem of interfering with radio transmissions? I mean, isn't that what they were really getting at with that particular section?

MR. TARRANT: They said, actually, and I will rely on the conferees' substitute report that is in the record, which is the legislative history and which is cited in many of the other cases dealing with household equipment, residential equipment, they say in the conferee report, we will not, or do not, delegate the authority to the FCC with respect to regulating business or office equipment, because the manufacturers of that equipment have done a pretty good job.

The complaints that Congress had received, revolved primarily around household, residential equipment, and if you go back and look at the conferees' report, they even gave examples to distinguish and differentiate between the types of equipment that one might find in a home for business versus the home for residential purposes. And that's one of the

arguments, the chaos argument, if you will, that the industry lawyers have made. This would lead to chaos.

Clearly not. Clearly Congress contemplated the distinction. Now, what's important is, one might say, and I said this to myself, well, the authority was only with respect to manufacturing. But the line of cases from 1982 -- and when you read those cases, keep in mind 1982, and most of the cases come afterwards. They say, simply because Congress delegated authority with respect to establishing minimum manufacturing standards for residential electronic equipment, all of that home electronic or residential equipment cannot be, or any of it, none of it, can be regulated by a state or local government.

In other words, courts have expansively interpreted the law in that area. They have never analyzed the facts that we bring to you today. That is why this case is so unusual. It's not just the impact on my clients. The unique factual situation that I am advancing today has never been analyzed by any state or federal court.

This is a first impression not only in this circuit but in this country. It is important because in 1985 and -- 1995 and 1996, with the advent of the major change in the Telecommunications Act, the industry attempted to preempt state and local governments, and they were told no. That's one of the reasons why we cited that act, at section 704. They preempt only with respect to personal wireless facilities, not broadcasting facilities, personal wireless facilities that are such things as cellular, only with respect to RFR, that complies with federal regulations. Therefore, towns and states can still, with personal wireless, monitor and enforce

and insure that there's compliance, and if there isn't, take action.

And I would argue, and I will argue in the appropriate forum, that if a personal wireless facility does not comply; that a zoning authority can step forward and make a proper decision.

Now, what's also important is that in 1996, the FCC adopted RFR regulations, technical regulations on health and safety for radiation, and they specifically again said no to the industry. We will not preempt with respect to broadcasters on radiation, even if states or local governments adopt their own technical standards. The argument that the FCC has been delegated technical authority has been weaved but from whole cloth and they have created this by going back to the 1940 and '43 cases. The Pottsville case, and it's the National Broadcasting case, in which the United States Supreme Court said, this is a brand new science. We are not going to interfere with the FCC promulgating regulations. Clearly, when Congress adopted a 1934 act, they couldn't envision every issue and therefore delegate every potential issue.

The FCC was created, your Honor, back in the '20s or '30s because broadcasters were coming on line and sharing frequencies, and someone had to allocate those broadcasting frequencies. That's the reponsibility of the FCC, identify the frequency, allocate them, oversee them. But in terms of reviewing effects of the signals, and there are three effects, the actual signal, the radiation that can have a health effect, and we know that's not preempted, and the interference that's in effect of the signal, the radiation signal. And that is not preempted.

Only -- it's only preempted as explained under 302(a) (1) and (2) -- (a) (1) and (a) (2). (a) (1) says that where the signals interfere with one another, the FCC has the authority over that interference.

And (a) (2) says where there's interference with home electronic equipment. And we have, thank goodness, very unusual case, because we have a conferee report that specifically explains that.

The problem that we get into is that a lot of the cases, I think including the Broyde case, and maybe another one, several of them, cite the last paragraph in the conferee report. It's quite specific. And there's a sentence or two that says the FCC shall have authority over RFI. And that's been cited in the other briefs. They failed to -- to cite the next sentence or two that says with respect to home electronic equipment, and they fail to cite three and four paragraphs up, the distinguishing language that says Congress does not delegate the authority to the FCC regarding business and office equipment.

As I said, that's important because the courts have interpreted the residential minimum standards to preempt any oversight by the states with respect to home electronic equipment. Any analysis for preemption obviously begins with the statutory construction, and what's the plain meaning of the statute. I am not going to go through this because obviously you understand that, and that's a fairly fundamental beginning.

So you look at the sections in 302(a). The next section is, if there's any ambiguity, and I suggest that perhaps there

is ambiguity with respect to what the term home electronic equipment means, you go to legislative history. And that's where you find the conferees' report.

I think the third step in the analysis is whether Congress intended to preempt the entire field or delegate the authority over the entire field, and again, I think you go back to 302(a) and the other sections in the conferees' report, and you find that Congress specifically addressed this issue.

We assume Congress knows how to draft an act. They know how to draft a statute. Specifically, the report helps us out tremendously. None of the cases, I want to remind the Court, have addressed this.

BANM and WIZN have come back in their surreplies and have said, oh, yes there are two cases. One is the Smith V Calvary case and one is the Helm V Louisville case. The Helm V Louisville case is not a case that involves business equipment. It's a case where the police department was broadcasting signals and they were being interrupted or interfered with by an FM station, and they were licensed by the FCC, and the other station is licensed. Clearly that's under the FCC authority. Clearly that comes under 302(a) - (a) (1).

With respect to the Smith V Calvary case, I would simply urge you to read it. It mentions business, in two places in the beginning paragraphs, and then never analyzes it but simply refers to the fact that none of the parties have cited any cases except the Blackburn case. The Blackburn case doesn't even have anything to do with home or business

equipment. It had to do with interference between two FM stations.

They cite the Blackburn case, and then they reference about nine sections in the FCC statute dealing -- dealing with interference. They don't analyze them, and they conclude. I would submit to you there is no precedent in that case. I submit to you that it should obviously be looked at because it relates back to the Blackburn case. There you can then look back at the conferee report and the section that it relies upon.

There is one other two other points, and I know it's getting late. I have touched on the technical issues. I have touched on the chaos and confusion. I have touched on the two cases they say relates to business.

THE COURT: What about the fraud?

MR. TARRANT: The fraud. We did raise it. I raised it before.

THE COURT: You did raise it before the board of zoning adjustment?

MR. TARRANT: Yes, I raised it. In fact, I made oral argument to them and advanced that argument quite strongly. And I don't believe it -- I'm not sure whether they addressed it in their -- they didn't address it in their decision, but I believe -- I believe I mentioned it in the appeal to the environmental court because I had raised it below, and I – all counsel were present when I did raise it.

THE COURT: Well, actually let me be more precise. In the opinion from the head of the board of zoning adjustment, there's an indication that representations had been made that WIZN had been untruthful in obtaining the permit, the conditional permit. But there never was a request on your part, at least addressed by the board of zoning adjustment, to revoke the permit based upon fraud, et cetera.

MR. TARRANT: They did not address it.

THE COURT: They did not address that -- did not raise that.

MR. TARRANT: I raised it. The town did not address it.

THE COURT: All right.

MR. TARRANT: I would be remiss if I did not say that in the arguments to the town, one or more of the parties representing either WIZN or BANM suggested to the town that they would -- there would be potential 1983 action against the town if they held against it, and I believe that that warning or suggestion was a very dampening effect on the town.

We are here because we have been harmed. We are going to carry this fight. We have a very, very strong argument. We think it's a worthy issue, and we hope that you will look at it closely.

We think that the arguments that they have -- the industry has advanced, rely on issues that really are not supportive of this case, their position in this case.

One last point and I will close, and that is, the beginning arguments by BANM this afternoon have to go with the fact that it has long been understood that the FCC has jurisdiction over transmitting. Yes, and if you look closely at the sections, clearly FCC has jurisdiction over transmitting. They do not have jurisdiction, however, with respect to anything other than what's set forth in 302(a) and incidentally and peripherally under those other sections.

They have created that argument. They have never cited 302(a) in their briefs. They never recited it. We think there's a reason for that. And they have never recited the relevant sections in the conferee report, and we think there's reasons for that, and we think those are dispositive cases.

THE COURT: All right. I will say that the memoranda are very well done, and I am going to take it under advisement, and I would anticipate certainly that you will get an opinion within 30 to 60 days. Somewhere in the range of 30 to 60 days, that's my assessment.

MR. TARRANT: Thank you.

THE COURT: All right. Appreciate it. Court's in recess.

(Concluded at 3:30 p.m.)

CERTIFICATION

I, ANNE E. NICHOLS, Official Court Reporter, United States District Court, do hereby certify that the foregoing is a true and accurate transcript of my stenographic

notes as taken by me in the matter of Freeman, et al. V Burlington Broadcasters, Inc., et al., Civil No. 96-295, on July 17, 1997, at the United States District Court, Burlington, Vermont.

Anne E. Nichols

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

[Dated September 6, 1996]

No.

In Re: Town of Charlotte Zoning	)
Permit Nos. 86-136-JO	)
and 91-62-SH	)
	)

NOTICE OF REMOVAL

Burlington Broadcasters, Inc., d/b/a WIZN ("WIZN") by and through its attorneys, McCormick, Fitzpatrick, Kasper & Burchard, P.C., NYNEX Mobile Limited Partnership 1 d/b/a Bell Atlantic NYNEX Mobile ("BANM"), by and through its attorneys, Burak & Anderson, and Charlotte Fire and Rescue Services, Inc., ("CFRS") by and through its attorneys, Heilmann, Ekman & Associates, Inc., hereby file this Notice of Removal, pursuant to 28 U.S.C. §§ 1441 (a) and 1446(b), to remove the above-referenced action from the Vermont Environmental Court, in which it is now pending, to the United States District Court for the District of Vermont.

1. On April 5, 1996, the Charlotte Zoning Administrator issued a notice of zoning violation against CFRS which is the owner of a radio transmission tower located in Charlotte, Vermont. CFRS uses the tower along

with WIZN and BANM. The notice of violition is attached as Exhibit 1 hereto. The notice of violation alleged, *inter alia*, that the users of the tower failed to comply with terms of approvals granted by the Charlotte Zoning Board in 1986, 1987 and 1991 and zoning permits issued by the Administrative Office in 1987 and 1991.

2. The notice of violation specifically cited CFRS, WIZN, and BANM for operating and/or permitting the operation of a broadcast facility that "has caused long-term and continuous [radio frequency] interference ("RFI") with electrical devices in home and business throughout the town". Notice of Violation, at 1-2. This was the only violation alleged by the Charlotte Zoning Administrator.

3. WIZN, CFRS and BANM filed a timely notice of appeal, and a public hearing was held before the Charlotte Zoning Board of Adjustment on May 22, May 28, and May 29, 1996.

4. More than ten interested persons (the "Neighbors") presented a petition at the hearing representing that they owned real property within Charlotte and any relief requested by Appellants, if granted, would not be in accord with the policies, purposes or terms of the zoning bylaws of the Town of Charlotte.

5. At the zoning hearing, WIZN and BANM argued that, pursuant to the Federal Communications Act of 1934 (as amended), 47 U.S.C. §§ 151 *et seq.*, the Federal Communications Commission has exclusive jurisdiction over the regulation of RFI phenomena and, therefore, the Charlotte Zoning Board is preempted from acting in this area

6. On July 11, 1996, the Charlotte Zoning Board of Adjustment issued a "Notice of Decision" in which it ruled that Congress intended to maintain exclusive federal jurisdiction over RFI phenomena and that the Zoning Board is without authority to regulate such interference. Therefore, the notice of zoning violation was dismissed. The Notice of Decision of the Charlotte Zoning Board is attached as Exhibit 2 hereto.

7. On August 8, 1996, the Neighbors filed a Notice of Appeal of the July 11, 1996 Zoning Board of Adjustment decision, pursuant to 24 V.S.A. § 4471, to the Vermont Environmental Court. The Notice of Appeal is attached as Exhibit 3 hereto.

8. Pursuant to 28 U.S.C. § 1441(b), the parties are removing this case because the district courts have original jurisdiction founded on a claim arising under the Constitution, treaties or laws of the United States. This case concerns a claim arising under the Federal Communication Act of 1934 (as amended), 47 U.S.C. §§ 151 et seq.

9. Copies of all process, pleadings, and orders served upon the parties are attached to this Petition as Exhibit 4 hereto.

10. The Notice is being filed within the time allotted under 28 U.S.C. § 1446Co), being within 30 days of the receipt by the parties of the initial pleading in this matter.

WHEREFORE, WIZN, BANM and CFRS remove the above-captioned action to the United States District Court for the District of Vermont.

DATED at Burlington, Vermont, this 6th day of September, 1996.

BURLINGTON BROADCASTERS, INC. d/b/a WIZN
/s/_____
By: John P. Cain, Esq.
McCormick, Fitzpatrick, Kasper & Burchard
P.O. Box 638
Burlington, VT 05402-0638
(802) 863-1028
Federal ID No.: 000-38-6019

NYNEX MOBILE LIMITED PARTNERSHIP 1 D/B/A BELL ATLANTIC NYNEX MOBILE
/s/_____
By: Brian J. Sullivan, Esq.
Burak & Anderson
P.O. Box 64700
Burlington, VT 05406-4600
(802) 862-0500
Federal ID No.: 000-56-2263

CHARLOTTE FIRE AND RESCUE SERVICES, INC.
/s/_____
By: Thomas F. Heilmann, Esq.
Heilmann, Ekman & Associates, Inc.
231 South Union Street
P.O. Box 216
Burlington, VT 05402-0216
(802) 864-4555
Federal ID No.: 000-34-8181

APPENDIX G

STATE OF VERMONT
VERMONT ENVIRONMENTAL COURT, SS.

[Filed September 6, 1996]

No. E96-129

IN RE: APPEAL OF	)
GRAEME AND MARY BETH	)
FREEMAN, ET AL. (RE: WIZN/	)
CVFR AND BANM TOWER)	)
	)

STATEMENT OF QUESTIONS

NOW COME Graeme and Mary Beth Freeman, et al. (the "Neighbors"), the appellants in this appeal, by and through their attorneys, Tarrant, Marks and Gillies, and pursuant to Vermont Rules of Civil Procedure 76(e)(4)(B) hereby submit the following Statement of Questions governing the scope of the appeal in the above captioned matter.

QUESTIONS

The Neighbors set forth and describe herein the issues on appeal in this matter as required by V.R.C.P. 76 (e)(4)(B) as follows.

I. Preemption.

On July 11, 1996, the Town of Charlotte Zoning Board of Adjustment ("Board") issued a Notice of Decision, concluding that despite undeniable harm and expense WIZN's radio transmissions have caused the citizens of the Town of Charlotte, the provision of WIZN's conditional use approval prohibiting interference was void *ab initio* and unenforceable. Notice of Decision Para. 17. This conclusion was based on a finding that the Board was without authority to regulate radio frequency interference (RFI) because Congress intended to maintain exclusive jurisdiction over RFI phenomena thereby preempting the field of RFI regulation. Id. Para. 16. The Neighbors dispute the Board's finding that it lacks authority to regulate the type of radio frequency at issue in this case. The issue is whether the Federal Communications Commission (FCC) occupies the entire field of RFI regulation thus preempting a state or local government's authority to regulate RFI.

1. Does federal law preempt state and local jurisdiction over interference?

II. Radio Frequency Interference.

A. WIZN

In paragraph (10) of its Notice of Decision, the Board holds that WIZN is in violation of the terms of its December 23, 1986, conditional use approval and of Zoning Permit No.

86-136-JO, which expressly references that approval.[1] Id. Para. 10; see also Para 9 (" . . . based upon the findings set forth above, the Board concludes that WIZN has created and continues to create interference that has affected homes and businesses in the community.")

B. BANM

Paragraph (9) of the Board's decision states in relevant part: "During the May hearings, this Board received no credible evidence demonstrating that either CVFR, BANM, or the Lane family have caused interference in Charlotte." Id. Para. 9. In reaching this conclusion the Board fails to address the evidence that incremental interference was not attributable to WIZN but to other users. The cumulative effects of the co-permittees' activities exacerbate the interference experienced by Charlotte residents.

2. Has BANM caused interference in Charlotte?[2]

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[1] The Board correctly found that WIZN has and continues to cause significant interference within the Town of Charlotte. This is not an issue of this appeal.

[2] (The Board correctly found that the federal law "applies to 'personal wireless facilities,' . . . and that the 1996 Telecommunications Act would apply to BANM "if it were in violation of the terms of its approval." The legal conclusion that federal law "applies to 'personal wireless facilities,' . . ." and that the 1996 Telecommunications Act would apply to BANM "if it were in violation of the terms of its approval(.)" is not an issue in this appeal.

C. CVFR

Paragraph (9) of the Board's decision states in relevant part: "During the May hearings, this Board received no credible evidence demonstrating that either CVFR, BANM, or the Lane family have caused interference in Charlotte." Id. Para. 9. In reaching this conclusion the Board fails to address the evidence that incremental interference was not attributable to WIZN but to other users. The cumulative effects of the co-permittees' activities exacerbate the interference experienced by Charlotte residents.

3. Has CVFR caused interference in Charlotte?

III. Co-permittee Liability.

4. As co-permittees, are BANM and/or CVFR responsible under Vermont case law for complying with permits and sharing fault for the WIZN permit violations even if the court finds that they do not incrementally add to the interference problems in the Town of Charlotte? See Secretary, Vermont Agency of Natural Resources v. Handy Family Enterprises, et al., 6 Vt. L.W. 143, 146 (April 14, 1995). Thus, if on review of the Board's decision this court finds the conditions of WIZN's permit valid and concludes that the conditions have been violated, the co-permittees share fault for any violations.

5. In 1986, the Zoning Board when voting to approve the WIZN tower[3] found that if any interference exists in the future when future applicants apply to gain permission to add antennas to the tower that the future applicants must first resolve the interference.[4] Thus, are BANM, as a successor in interest to Contel Cellular, and CVFR responsible under the conditions to the original permit issued to construct the WIZN tower for solving any interference since WIZN had created interference that was continuing at the time Contel (BANM's predecessor) and CVFR applied for a permit.

IV. Fraud, Deceit and Misrepresentation.

A. WIZN

In Paragraph (2) of its decision, the Board looks to the December 23, 1986, conditional use approval granted to WIZN for the purpose of constructing the WIZN tower. The conditional use approval was made orally and subject to certain conditions. The most relevant and important condition is reflected in the Board's Findings of Fact and Decision, dated January 7, 1987, requiring "any interference with reception in homes in the area because WIZN begins broadcasting will be remedied by WIZN." Id. 2; See also, Charlotte Zoning Board of Adjustment, Findings of Fact and

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[3] The tower was planned for and constructed by WIZN for its primary use. Subsequently it transferred the tower to CVFR.

[4] See paragraph 4, *infra*, of the Statement of Questions addressing fraud, deceit and misrepresentation.

Notice of Decision, January 7, 1987. The Board in arriving at its decision to grant WIZN the conditional use permit, relied upon representations made by WIZN station manager, Michael Calhoun. Calhoun stated at the December 23, 1986, hearing that "there will not be any interference and if there is, WIZN will trap it out." Charlotte Zoning Board of Adjustment, Minutes, December 23, 1986.

6. Based on fraud, deceit and misrepresentations is WIZN subject to state and/or local jurisdiction?

B. BANM and CVFR

The Board's December 23, 1986, approval of WIZN's application to construct the tower expressly provided that "any other antennas authorized in Charlotte--the last one in does an intermodulation study and solves problems, if any."

In 1991 the Board orally approved an application from CVFR and Contel Cellular of Vermont, now BANM, to add four whip antennas and certain other facilities to the WIZN tower, subject to certain conditions. Based upon representations made by the applicants the Board concluded that "there would be no interference to homeowners because of this request," see Charlotte Zoning Board of Adjustment, Findings of Fact and Notice of Decision, October 28, 1991, and decided to grant the permit. In arriving at this decision, the Board again relied upon representations that the CVFR/Contel (BANM) proposal would cause no interference to homeowners. See Charlotte Zoning Board of Adjustment, Minutes, October 16, 1991.

7. Based on fraud, deceit and misrepresentations are BANM and CVFR subject to state and/or local jurisdiction and responsible for the interference in the Town of Charlotte?

V. Consumer Rights of Charlotte Residents Have Been Violated

8. Have the residents of Charlotte have been denied their rights as consumers to use household equipment and appliances in a reasonable and satisfactory manner due to WIZN, BANM and CVFR being in violation of Section 253 of the Telecommunications Act of 1997 ("Nothing in this section shall affect the ability of a State to safeguard the rights of consumers.") The zoning permits at issue protected those rights.

DATED at Montpelier, Vermont, this 6th day of September, 1996.

THE NEIGHBORS

By: /s/_____
Gerald R. Tarrant, Esq.
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05601-1440

APPENDIX H

TOWN OF CHARLOTTE
ZONING BOARD OF ADJUSTMENT

[Dated July 11, 1996]

IN RE APPEAL OF BURLINGTON BROADCASTING d/b/a WIZN-FM, et al.	)

NOTICE OF DECISION

This is an appeal from an April 5, 1996 notice of violation issued by Brian Roddy, the Charlotte Zoning Administrator, to the Marion Lane Estate, Charlotta Fire and Rescue Services, Inc., Burlington Broadcasters, Inc., d/b/a WIZN-FM, and Bell Atlantic NYNEX Mobile, Inc. ("Appellants") for failure to comply with the terms of approvals granted by this Board in 1986, 1987 and 1991 and zoning permits granted by the Administrative Officer in 1987 and 1991. The notice of violation specifically cited Appellants for operating and/or permitting the operation of a broadcast facility that "has caused long-term and continuous [radio frequency] interference ("RFI") with electrical devices in homes and businesses throughout the town." Notice of Violation at 1-2.

Burlington Broadcasters, Inc., d/b/a WIZN-FM ("WIZN") filed a timely notice of appeal of the Zoning

Administrator's decision on April 18, 1996. NYNEX Mobile Limited Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM"), Charlotte Volunteer Fire and Rescue Services, Inc. ("CVFR"), and the Estate of Henry J. Lane, the Henry J. Lane Revocable Trust and the Estate of Marion J. Lane ("the Lane family") filed a timely notice of appeal on April 22, 1996.

Public hearings were conducted in this matter on May 22, 28 and 29, 1996 ("the May hearings"). A quorum of the Board was present on each occasion and heard evidence relative to the April 5, 1996 notice of violation and Appellants, challenge to that notice. More than ten (10) "interested persons" (a/k/a "the neighbors") signed petitions representing that they owned real property within the Town of Charlotte and alleging that any relief requested by Appellants, if granted, would not be in accord with the policies, purposes or terms of the zoning bylaws of the Town of Charlotte.

I. GENERAL FINDINGS OF FACT

1. WIZN is a commercial broadcaster operating an FM radio station under the authority of the Federal Communications Commission ("F.C.C").

2. In November 1986, WIZN and CVFR jointly applied for a zoning permit to erect a radio transmission tower on Pease Mountain off Church Hill Road in Charlotte, on property owned by and leased from Henry and Marion Lane. On December 23, 1986, this Board orally granted WIZN and CVFR conditional use approval to construct the communications tower, subject to certain conditions.

Specifically, the Board's Findings of Fact and Decision, dated January 7, 1987, required that "any interference" with reception in homes in the area because WIZN begins broadcasting will be remedied by WIZN." Charlotte Zoning Board of Adjustment, Findings of Fact and Notice of Decision, January 7, 1987. Further, the minutes of the December 23, 1986 hearing indicate that Michael Calhoun, the former WIZN station manager, represented to the Board that "there will not be any interference and if there is, WIZN will trap it out." Charlotte Zoning Board of Adjustment, Minutes, December 23, 1986. The Zoning Administrator issued Zoning Permit No. 86-136-JO listing Henry and Marion Lane as property owners and WIZN as lessee, on December 24, 1986.

3. WIZN constructed an approximately 199' radio transmission tower on the Pease Mountain site in 1987 and subsequently conveyed the transmission facility to CVFR. WIZN and CVFR began broadcasting from the tower in April, 1987, with WIZN leasing space on the tower from CVFR.

4. On October 16, 1991, this Board orally approved an application from CVFR and Contel Cellular of Vermont, now BANM, to add four whip antennas to the existing tower, subject to certain conditions. Specifically, the Board's Findings of Fact and Notice of Decision, dated October 28, 1991, states that "there would be no interference to homeowners because of this request." Charlotte Zoning Board of Adjustment, Findings of Fact and Notice of Decision, October 28, 1991. Further, the minutes of the October 16, 1991 meeting indicate a Board member inquired whether the CVFR/Contel Cellular proposal would create

interference to homeowners and Charles Cannata of CVFR replied that "there would be none." Charlotte Zoning Board of Adjustment, Minutes, October 16, 1991. On October 17, 1991, the Zoning Administrator issued Zoning Permit No. 91-62-SH to CVFR and Contel Cellular.

II. FINDINGS OF FACT REGARDING INTERFERENCE

5. WIZN acknowledges that it received approximately twenty-six (26) complaints during its first two years of operation and a limited number of additional complaints until 1995. Further, in early 1996, a group of Charlotte residents distributed a questionnaire to other citizens requesting information regarding their interference problems and WIZN's response to those problems. Eighty-eight (88) households returned surveys indicating that they were experiencing interference problems in their homes or businesses. Specifically, Charlotte residents identified problems with various electrical and electronic devices, including but not limited to telephones, answering machines, radios, stereos and tape machines, public address systems, televisions and VCRs, baby monitors, computers and security systems. In many cases, individuals experiencing interference problems noted that they could hear WIZN's audio signals over their electronic equipment.

6. During the May hearings on this matter, the Board received extensive testimony from various Charlotte residents both corroborating and supplementing the information contained in the surveys. The Board also heard testimony from David Groth, WIZN's technical consultant, who prepared a report detailing his study of the Pease

Mountain transmitter site. Mr. Groth's report concludes that WIZN is currently operating in compliance with F.C.C. rules and regulations. Engineering Report, WIZN-FM Site, Pease Mountain, Interference Study and Recommendations, May 10, 1996 at 12.

7. Based on all of the evidence, the Board finds that WIZN has caused continuous and widespread RFI that has impaired the ability of Charlotte residents to communicate transact business and experience the peaceful enjoyment of their homes and property. In addition, the Board finds that these individuals have expended substantial amounts of money in their attempts to remedy interference problems.

8. Prior to 1996, WIZN made sporadic attempts to assist individuals experiencing RFI problems. During this period, between 1986 and 1996, WIZN's efforts to reduce and/or eliminate RFI were largely ineffective. Only after receiving the 88 surveys and notice of a potential zoning violation, did WIZN undertake a determined effort to resolve RFI complaints. While WIZN has successfully reduced and/or eliminated RFI in some cases, other Charlotte residents continue to experience annoying, costly, and burdensome interference problems.

9. During the May hearings, this Board received no credible evidence demonstrating that either CVFR, BANM, or the Lane family have caused interference in Charlotte. However, based upon the findings set forth above, the Board concludes that WIZN has created and continues to create interference that has affected homes and businesses in the community.

10. Accordingly, WIZN is in violation of the terms of its December 23, 1986 conditional use approval and of Zoning Permit No. 86-136-JO, which expressly references that approval.

11. As an "affirmative defense" to its actions, WIZN argues that, pursuant to the Federal Communications Act (FCA) of 1934, the F.C.C. has exclusive jurisdiction over the regulation of RFI phenomena and, therefore, this Board is preempted from acting in this area. See WIZN's Memorandum of Law, May 22, 1996, at 2-6; WIZN's Reply Memorandum of Law, June 10, 1996, at 1-10. WIZN has cited numerous cases in support of this proposition.

12. Federal law may preempt state and local law in three ways. First, by express Congressional command. Second, if state or local law would actually conflict with federal law in a particular area and, third, if federal law so thoroughly occupies a legislative field so as to make reasonable the inference that Congress left no room to supplement it. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). In this case, the first and second bases for preemption do not apply. The Federal Communications Act of 1934 does not expressly preempt state and local zoning law, nor do the Charlotte Zoning Bylaws actually conflict with federal law.

13. The Board has carefully reviewed the memoranda submitted by the parties and the case law cited therein, including but not limited to Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al., CIV-91-6140T (W.D.N.Y 1991); Broyde v. Gotham Tower, Inc., 13 F.3d 994 (1994); Smith v. Calvary

Educational Broadcasting Network, 783 S.W.2d 533 (Mo. Ct. App. 1990); Still v. Michaels, 803 P2d 124 (Az.Ct.App. 1990); In the Matter of 960 Radio, Inc., Licensee of Station KJSN(FM), Klamath Falls, Oregon, Petition for Declaratory Ruling, 1985 WL 193883 (F.C.C.), October 29, 1995; and Blackburn v. Doubleday Broadcasting Company, Inc. et al., 353 N.W 2d 550 (1984). These cases generally indicate that Congress intended to "occupy the field" in the area of radio transmissions and remove from state and local government the power to regulate RFI.

14. The Great Lakes case is most factually and procedurally analogous to the situation presented here. In that case, the Court held that although "the power of local governments is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities," in enacting the Federal Communications Act of 1934, Congress intended to preempt the authority of state and local governments to regulate RFI phenomena. See Great Lakes, *supra,* at 5, 9.

15. The neighbors contend that this Board has jurisdiction in this case, arguing that "[a]ll judicial cases holding that local and state governments do not have jurisdiction were decided before the enactment of the Telecommunications Act ("TCA") of 1996[,]" which amends the 1934 Act. See Neighbors' Memorandum in Support of Zoning Administrator's Decision, May 22, 1996, at 1, 3-8. They claim that §704 of the TCA expressly preserves local and state jurisdiction over the placement, construction, and modification of the Pease Mountain facility. Id. The Board has carefully reviewed §704 the TCA of 1996, cited by the neighbors. Based on this review, the Board concludes that

§704 applies to "personal wireless service facilities" and "personal wireless services," which do not include commercial FM broadcasting facilities.[1] Therefore, nothing in §704 of the TCA of 1996 alters prior law on federal preemption of RFI caused by FM radio broadcasting.

16. Based on the foregoing, the Board concludes that the Congress intended to maintain exclusive jurisdiction over RFI phenomena and the Board is without authority to regulate such interference. "In the area of radio frequency interference, Congress has considered the competing interests and determined that the benefits of uniform, federal control of radio transmission by the FCC outweigh the interests of local government." Great Lakes, *supra,* at 13.

17. Accordingly, a majority of the Board concludes that despite the undeniable harm and expense that WIZN's radio transmissions have caused the citizens of Charlotte, the provision of its conditional use approval prohibiting interference is void ab initio and unenforceable.[2] This result

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[1] The TCA of 1996, which primarily involves direct broadcast satellite service, personal communication service (PCS), and cellular service, would apply to BANM, as a cellular service provider, if it were in violation of the terms of its approval.

[2] The residents of Charlotte are not without recourse to continue addressing the interference problems they are experiencing. Residents may lodge both informal and formal complaints with the local F.C.C. field office in Boston, Massachusetts. See 47 C.F.R. §§1.716 et sec. The F.C.C. has enacted regulations to resolve FM blanketing interference

is particularly disturbing given WIZN's representation during the December 23, 1986, hearing that "there will not be any interference and if there is, WIZN will trap it out." Clearly, WIZN has not fulfilled that pledge.

18. The Vermont Supreme Court has held that, in certain circumstances, "co-permittees are both responsible for complying with . . . permits and share fault for the violations." See Secretary, Vermont Agency of Natural Resources v. Handy Family Enterprises, et al., 6 Vt.L.W. 143, 146 (April 14, 1995). In addition, it is well established that a property owner may be liable for the zoning violation of his or her tenant. See 24 V.S.A. §§4443(a)(1), 4444(a). However, since this Board has determined that the condition prohibiting interference is void and unenforceable, neither CVFR, as a co-permittee with WIZN and the owner of the radio transmission tower, nor the Lane family, as the property owners, have engaged in any activity that violates the terms of the prior approvals issued by this Board or the Zoning Administrator in connection with this case.

DATED at Charlotte, Vermont, this 11th day of July, 1996.

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complaints and is authorized to evaluate whether WIZN has satisfied its obligations pursuant to those regulations. See 47 C.F.R. §573.318; In re Application of Calvary Broadcasting Network, Inc., 7 F.C.C.R. 4037 (1992); 47 C.F.R. §1.41 (1992). Residents may also file petitions to deny any license or renewal application filed with the F.C.C. by WIZN. 47 U.S.C. §309(d); 47 C.F.R. §73.3584 (1992). In addition, the United States Court of Appeals for the District of Columbia Circuit is authorized to hear appeals from decisions of the F.C.C. 47 U.S.C. §402(b).

Zoning Board Notice of Decision - 7/11/96

CHARLOTTE ZONING BOARD OF ADJUSTMENT

/s/_____

Jonathan W. Fisher, Chair

APPENDIX I

NOTICE OF ZONING VIOLATION

[Dated April 5, 1996]

April 5, 1996

Mr. Henry J. Lane
Marion Lane Estate
P.O. Box 56
Charlotte, VT 05445

Mr. Charles Kellner, President
Charlotte Fire and Rescue Services, Inc.
P.O. Box 85
Charlotte, VT 05445

Mr. Arthur J. LaVigne, F.D.
Burlington Broadcasters, Inc. WIZN-FM
P.O. Box 1067
Burlington, VT 05402-1067

Mr. Christopher F. Ciolfi
Manager Real Estate - Zoning
Bell Atlantic NYNEX Mobile, Inc.
46 Boradway
Menands, NY 12204

Re: Town of Charlotte Notice of Zoning Violation

Dear Mr. Lane, Mr. Kellner, Mr. LaVigne, and Mr. Ciolfi:

Please be advised that based on information available to the Town, you have commenced land development on your property, or property leased by you on land owned by Henry Lane and the Mario Lane Estate, on Church Hill Road in Charlotte. The activity you have initiated and carried out is not in compliance with the zoning bylaws of the Town of Charlotte and is in violation of Charlotte Zoning Board of Adjustment approvals granted in 1986-87 and 1991 and zoning permits issued in 1987 and 1991.

Pursuant to my investigation of the activity conducted by you on this property, and in accordance with 24 V.S.A. Section 4444 and Sections 1.3 and 7.5 of the Charlotte Zoning Bylaws, I am by this letter notifying you of the following violation:

> The operation of this broadcast facility has caused long-term and continuous interference with electrical devised in homes and businesses throughout the town. Transmissions from this tower continue to interfere with devices including, but not limited to, telephones, answering machines, stereos and tape machines, public address systems, televisions and VCRs, baby monitors, and computers and security systems. In addition, broadcasts from this facility interfere with or completely override the reception of other stations on the FM dial. Finally, the Town has received testimony that despite a history of complaints to WIZN-FM, the apparent source of the interference, problems with interference have gone unresolved or have been remedied to

some extent mostly at the complainant's expense.

Zoning Board approval for Charlotte Volunteer Fire and Rescue Services, Inc. and Radio Vergennes (WIZN) for this facility required that "Any interference with reception in homes in the area because WIZN begins broadcasting will be remedied by WIZN," Findings of Fact and Notice of Decision, 1-7-87. In fact, Mike Calhoun testified for WIZN at the zoning board hearing on December 23, 1986 that "there will not be any interference and if there is WIZN will trap it out." Charlotte Zoning Board minutes, 12-23-86. Subsequent zoning Board approval for Charlotte Volunteer Fire and Rescue Services, Inc. and Contel Cellular of Vermont to add four antennae to the tower and erect a building on the site held that "There would be no interference to homeowners because of this request." Finding of Fact and Notice of Decision, 10-28-91.

Based on the testimony of Charlotte residents and my personal experiences, I have concluded that a) there have been, and there continues to be, widespread problems for residents of Charlotte caused by interference from broadcasts from this communications facility, and b) interference problems that have been reported over time have not been successfully eliminated. Consequently, this

> communications facility is operating in violation fo the terms and conditions of the zoning board approvals granted in 1986-87 and 1991, Article IV of the zoning bylaws in effect at the time, and Section 6.4 of the zoning bylaws currently in effect.

You have seven (7) days from the date of this notice to discontinue this violation and take appropriate remedial action. Specifically, you must accomplish the following:

> Eliminate all problems experienced by residents and businesses in Charlotte which are caused by interference from this facility and provide all means necessary to ensure that interference problems will not resume, or recur in some other form, in the future.

If you do not accomplish these actions within seven (7) days of the date of this notice, the Town may pursue this matter in court. In such court proceeding, the Town will be entitled to seek appropriate injunctive relief and fines of up to fifty (50) dollars per day for each day your violation continues beyond the seven (7) day period provided in this notice.

If the violations described in this notice occur again within twelve (12) months of the date of this notice, you will not be entitled to receive a further Notice of Violation from the Town before the Town pursues further enforcement proceedings.

You may appeal this Notice of Violation to the Charlotte Zoning Board of Adjustment by filing a written Notice of

Appeal, along with an $85.00 fee, within fifteen (15) days of the date of this notice with the clerk of the Board of Adjustment at the following address:

Gloria Warden
Charlotte Town Hall
P.O. Box 119
Charlotte, VT 05445

If you have any questions regarding this notice, you may reach me at the Charlotte Planning and Zoning Office (802-424-3533).

Sincerely,

/s/_____
Brian Roddy
Zoning Administrative Office

cc: Charlotte Selectboard
Steve Stitzel, Esq., Town Attorney
Lou Borie, District Environmental Coordinator
Graeme and Mary Bet Freeman
Michael and Holly Fournier
Frank and Elaine Ittleman
Lawrence and Linda Hamilton

APPENDIX J

ZONING BOARD OF ADJUSTMENT
MINUTES OF MEETING

[Dated November 20, 1986]

Present: John Butler - Chairman, William Pinney, Kenyon Smith, Murray Foote, Stuart Bennett, James Olson - Zoning Administrator, Terry Silva.

Minutes of the meetings of November 3, 1986, and November 18, 1986, were approved by unanimous vote of the members. Motion to approve made by Ken Smith. Minutes of November 12, 1986, meeting were changed as follows: last paragraph re: WIZN will read ". . . Fire department will own the tower. Tower must be visited once a week per WIZN (per federal regulations), and they will perform the maintenance on it. Kenyon Smith moves to approve these minutes with the above changes. Motion seconded and passed by unanimous vote.

An application by Mark & Sheila Fischer for setback variance to move proposed dwelling site north in order to put in septic system on Ferry Road, under Article III, Section 320 of the Charlotte Zoning Regulations.

This is continuation of hearing held 11/12/86.

Kurt Fischer appeared for Mark & Sheila Fischer. John Butler and Ken Smith have visited site since last meeting. Letter from neighbors Neal and Wulfson filing no objection, filed. Septic design reviewed.

William Pinney moves to approve application by Mark & Sheila Fischer. Seconded and passed by unanimous vote.

Application by Radio Vergennes, Inc., dba/WIZN and Charlotte Fire and Rescue Services for construction of a communications tower on land owned by Henry and Marion Lane on Church Hill Road, conditional use under Article III, Section 310 of the Charlotte Zoning Regulations.

This is a continuation of hearing held 11/12/86.

Charles Cannata appeared for Charlotte Fire and Rescue Services. He stated that it would cost $9,000 for the Fire and Rescue to replace the tower they have now, which would not solve communications problems. Tower in place has 75% of supporting structure gone. Mike Calhoun for WIZN stated that quote to build proposed tower is approx. $20,000 just for steel structure.

Stuart Bennett has talked with the town attorney who told him Zoning Board may grant a use variance, under the 5 criteria for variances in the statute. Ken Smith suggests putting matter on the ballot for town meeting to change agricultural zone to commercial zone for the tower. Cannata noted shortage of manpower in department to lobby for passage of such a change. Feels under Article III, Section 300.7 of the Zoning Regulations for Charlotte that since tower itself is to be owned by the department, is an allowed use. Calhoun noted that once the structure is up and built, the ownership would transfer to the fire department of the town. WIZN leases the land, tower would be built at WIZN expense, then given to the town. Use of the tower would be leased from fire dept. by WIAN. Matter taken under advisement by the board.

An application by Mel and Susan Hunter for approval of home occupation on land owned by Lawrence Lavalette, east side of Route 7, under Article III and Article VIII, Section 870 of the Charlotte Zoning Regulations.

Survey of Lavalette property previously filed, reviewed. Plan is to subdivide a 10.1 acre lot on north side of Smith property for Hunter house and studio. Proposed curb cut and access to the lot would have to be addressed by the Planning Commission. Proposed home occupation is to make and sell lithographic prints. Operates out of Burlington at present, used two printing presses. Has one employee, and has used temporary employees when needed (students). Hunter showed board article in Burlington Free Press dated 2/19/86 and showed lithographs he has done to indicate the nature of his business.

Hunter proposes to build a two story 39' x 50' house, with a one story wing 73' x 36' to house the printing presses. Proposes to use the bottom story of the house for studio, and upper story for living quarters. Also proposes to build a 2 car garage in future. Has talked with contractor Eric Bown about building. Drawing of house to show what it would look like from Route 7 reviewed.

Hunter would need the 4 sq. ft. sign allowed in regulations for home occupation, to identify his business. Wants to operate a gallery on premises and will take orders from outside that will have to be shipped. Currently handles such orders by taking them to pack and ship place in Burlington. Feels traffic will be minimal at the site. Would need infrequent shipments of paper, etc. to be delivered to his home.

Hilary Smith, adjoining landowner, concerned about proximity of proposed driveway to the runway at the rear of her house.

Zoning Board members concerned about regulation that states a minor portion of dwelling may be used for home occupation. Question of access discussed – must be taken before the Planning Commission.

Stuart Bennett moves to approve application of Mel and Susan Hunter. Motion seconded. Vote is 0 in favor, 5 opposed. Motion does not pass. Reason is that (Section 870 of Zoning Regulations) home occupation will not occupy a minor portion of the dwelling.

Application by Radio Vergennes and Charlotte Fire and Rescue Services discussed. Board members agree that they are in favor of providing the town with improved rescue facilities.

Stuart Bennet moves to approve application by Radio Vergennes, and Charlotte Fire and Rescue Services for construction of a communications tower on land owned by Henry and Marion Lane on Church Hill Road. Motion seconded. Vote is 1 in favor (John Butler), 4 against. Motion does not pass. Board does not feel that this is a conditional use a specified under Article III, Section 310 of the Charlotte Zoning Regulations.

Board discussed its Findings of Fact in the application by J. Graham Goldsmith for conditional use permit for yacht club facility on land formerly owned by Arthur Williams on Lake Road Extension. Findings will be sent out as corrected, as soon as possible.

Meeting adjourned at 10 p.m.

Terry Silva
Planning Administrator

APPENDIX K

ZONING BOARD OF ADJUSTMENT
MINUTES OF MEETING

[Dated December 23, 1986]

Present: William Pinney, Acting Chairman, Stuart Bennett, Murray Foote Kenyon Smith, James Olson, Terry Silva

Findings of Fact signed for December 3, 1986 meeting. Upon motion by Stuart Bennett, minutes of the meeting held December 3, 1986 were approved by unanimous vote of members present.

William Pinney is acting chairman because John Butler could not attend this evening's meeting.

Application by Radio Vergennes, Inc. dba/ WIZN-FM and Charlotte Fire and Rescue Services, Inc. for conditional use under Section 895.4, 3220.7 and 820 of the Charlotte Zoning Regulations for communications tower on land owned by Henry and Marion Lane on Church Hill Road.

Application reviewed. Jim Olson asked if zone change (Agricultural/ Residential to Commercial) is within the lot owned by Lanes. Pinney replied that it was. George Richardson reviewed picture previously submitted. Pinney noted that since all the pertinent facts were discussed at the last hearing on this matter (11/20/86), another presentation by the Rescue Services and Radio Vergennes is not needed and the board will proceed directly to questions.

Pinney noted that zone change is 145' from southern lot line.

George Richardson concerned that antenna placement will affect his view from his home on Greenbush Road, of Pease Mountain.

Kenyon Smith asked about each of the attachments to the antenna. Charles Cannata reviewed attachments as listed in Agreement filed with these minutes. (page 1, item 3). There will be no lights on the tower - height avoids FAA requirement for lights. Radio Vergennes and Charlotte Fire department agree not to paint the tower. It will be galvanized (dull gray).

There will be three supports for the tower, which will necessitate some tree cutting. Richardson concerned that a "swath" is not cut on the side of the hill. WIZN assures that minimum number of trees will be cut. Space will need to be cleared but enough for bulldozer to get in to site.

Building will be 18' x 24'. Cutting will not show from off site. Aerial map reviewed.

Discussion of negotiating for ownership of generator, etc. WIZN agrees to put up a new UHF link at Shelburne. Twenty-year agreement can be extended per C. Cannata. Extension agreement is in lease with Lanes.

Concern that FM broadcasts will affect reception in homes in area. Mike Calhoun noted that there will not be any interference and if there is, WIZN will trap it out. WIZN will be broadcasting 50,000 watts night and day. Two subsidiary channels can be used. If so, no more antennas are involved. Bill Pinney noted that any addition to the tower is a change of use and has to be reviewed by the Zoning Board of Adjustment.

Kenyon Smith moves that the application be approved subject to the conditions of the lease between Henry and Marion Lane and Radio Vergennes and subject to conditions of the agreement between Radio Vergennes, the Charlotte Volunteer Fire and Rescue Services and the Lanes, subject to tower design and the equipment thereon, copies of which are attached to and made part of this permit. The antenna will remain unpainted. The generator and electrical equipment remain the property of the Charlotte Volunteer Fire Department if WIZN leaves the site. WIZN will provide protection for local residents with traps for any interference. Any other antennas authorized in Charlotte -- the last one in does an intermodulation study and solves problems, if any. Any addition of equipment to the mast not shown on the diagram shall be reviewed by the Zoning Board of Adjustment before it is installed.

Motion seconded. Vote is 4 in favor, 0 opposed. Motion passes. William Pinney indicates that John Butler voted in favor, in absentia.

Meeting adjourned at 8:30 p.m.

Terry B. Silva
Clerk

APPENDIX L

FINDINGS OF FACT AND NOTICE OF DECISION

[Dated January 7, 1987]

Application by Radio Vergennes, Inc. dba/ WIZN Services, Inc.

Based upon the application of Radio Vergennes, and Charlotte Fire and Rescue and the supporting documents submitted by the applicants as presented at the hearing held December 23, 1986, the Charlotte Zoning Board of Adjustment finds the following:

1. Applicants wish to build a communications tower on land owned by Henry and Marion Lane on Church Hill Road.

2. Applicants appeared before the board on 11/20/86 with similar request which was denied. Difference in current request is that tower would now be located within 50' buffer zone to the commercial zone.

3. Attachments to the antenna were listed, reviewed. Any further attachments other than those listed will have to come for review by the Zoning Board.

4. Tower will be 199' high and will not need lighting. Tower will be of galvanized metal and will not be painted. Tower will need three supports.

5. Agreement between Radio Vergennes, Charlotte Fire and Rescue Services and the Lanes is filed with these minutes. Lease of Lane' land between Lanes and Radio Vergennes is filed with these minutes.

6. Building will also be built (on site) 18' x 24'.

7. Any interference with reception in homes in the area because WIZN begins broadcasting will be remedied by WIZN. WIZN will broadcast 50,000 watts per day.

8. Generator and electrical equipment will remain the property of the Charlotte Volunteer Fire Department if WIZN leaves the site.

Notice of Decision

Proposed use is allowed under Sections 895.4, 220.7 and 820 of the Charlotte Zoning Regulations.

Wherefore, application for conditional use by Radio Vergennes and Charlotte Fire and Rescue Services for communications tower is approved.

Dated this 7th day of January, 1987.

_____
Acting Chairman

/s/_____

/s/_____

/s/_____

APPENDIX M

REQUEST OF CHARLOTTE VOLUNTEER FIRE AND RESCUE

FINDINGS OF FACT

[Dated October 28, 1991]

Based upon the application of the Charlotte Volunteer Fire and Rescue, and the supporting evidence submitted by representatives of the Applicant at a public hearing held on October 16, 1991, the Charlotte Zoning Board of Adjustment, finds the following:

1) Applicant has a communications tower on the northwest side of Pease Mountain (on property owned by Henry Lane).

2) Applicant, in association with Contel Cellular, would like to mount four whip antennas onto the present tower, a maximum of 13' in height, at approximately the 100' mark on the tower. This would provide Contel the opportunity to expand their services.

3) Contel would lease space from the Charlotte Volunteer Fire and Rescue in regard to the tower, in turn they would provide free service for the ambulance which has a Contel cellular telephone. There is also the possibility Charlotte will gain 911 service in the future with this request.

4) There would be no interference to homeowners because of this request.

5) Currently a block building exists where the tower is located this houses equipment for WIZN. Another structure, 12'x 28' x 8.25', is requested by the Applicant, to be connected to and behind the existing structure. The roof will not be pitched and will not be visible from Church Hill Rd. or Rt. 7. The proposed building will be prefabricated and placed on a slab.

6) This tower is in the Conservation District and tree cutting will be kept to a minimum according to the Applicant.

NOTICE OF DECISION

Based on the foregoing Findings of Fact, the Zoning Board of Adjustment, approved the application of the Charlotte Volunteer Fire and Rescue, on behalf of the Contel Cellular, to affix four whip antennas of not more than 13' high, to the existing radio tower, and not to exceed the height of the tower; at the base of the tower a 12' x 28' x 8.25' prefabricated structure may be placed, to house necessary equipment; since this is in the Conservation zone, a minimum of tree cutting will be allowed.

Dated at Charlotte, VT this 28th day of October, 1991.

/s/_____
VICE CHAIRMAN

In accordance with 24 V.S.A. §4471, you may appeal the Board's decision to the Superior Court of Chittenden County within thirty (30) days of the date of this decision.

APPENDIX N

* * *

pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an

rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY- Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) PRESERVATION OF LOCAL ZONING AUTHORITY-

(A) GENERAL AUTHORITY- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) LIMITATIONS-

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is

duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) DEFINITIONS - For purposes of this paragraph--

(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

(b) RADIO FREQUENCY EMISSIONS- Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY- Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the

current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

SEC. 705. MOBILE SERVICES DIRECT ACCESS TO LONG DISTANCE CARRIERS.

Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(8) MOBILE SERVICES ACCESS- A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to . . .

APPENDIX O

P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996

SENATE REPORT NO. 104-230
February 1, 1996

Mr. Pressler, from the committee of conference, submitted the following CONFERENCE REPORT [To accompany S. 652]

The committee of conference on the disagreeing vote of the two. Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) Short Title.-This Act may be cited as the "Telecommunications Act of 1996".

(b) References.- Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

SEC. 3. DEFINITIONS.

When utilizing the term "functionally equivalent services" the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally

applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase "substantial evidence contained in a written record" is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the

environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and area not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 70%(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion

of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

SECTION 705-MOBILE SERVICE DIRECT ACCESS TO LONG DISTANCE CARRIERS

S. 652

One Hundred Fourth Congress of the United States of America AT THE SECOND SESSION Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment, of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE- This Act may be cited as the "Telecommunications Act of 1996"

(b) REFERENCES- Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.
Sec. 2. Table of contents.
Sec. 3. Definitions.

TITLE I--TELECOMMUNICATION SERVICES

SUBTITLE A--TELECOMMUNICATIONS SERVICES

Sec. 101. Establishment of part II of title II.
PART II--DEVELOPMENT OF COMPETITIVE MARKETS
Sec. 102. Eligible telecommunications carriers.
Sec. 103. Exempt telecommunications companies.
Sec. 104. Nondiscrimination principle.

SUBTITLE B- SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

Sec. 151. Bell operating company provisions.

PART III--SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES
TITLE II--BROADCAST SERVICES

Sec. 201. Broadcast spectrum flexibility.
Sec. 202. Broadcast ownership.
Sec. 203. Term of licenses.
Sec. 204. Broadcast license renewal procedures.
Sec. 205. Direct broadcast satellite service.
Sec. 206. Automated ship distress and safety systems.
Sec. 207. Restrictions on over-the-air reception devices.

TITLE III--CABLE SERVICES

Sec. 301. Cable Act reform.
Sec. 302. Cable service provided by telephone companies.
PART V--VIDEO PROGRAMMING SERVICES PROVIDED BY TELEPHONE COMPANIES
Sec. 303. Preemption of franchising authority regulation of telecommunications services.
Sec. 304. Competitive availability of navigation devices.
Sec. 305. Video programing accessibility.

TITLE IV--REGULATORY REFORM

Sec. 401. Regulatory forbearance.
Sec. 402. Biennial review of regulations; regulatory relief.
Sec. 403. Elimination of unnecessary Commission regulations and functions.

TITLE V--OBSCENITY AND VIOLENCE
SUBTITLE A--OBSCENE, HARASSING, AND WRONGFUL UTILIZATION OF TELECOMMUNICATIONS FACILITIES

Sec. 501. Short title.
Sec. 502. Obscene or harassing use of telecommunications facilities under the Communications Act of 1934.
Sec. 503. Obscene programming on cable television.
Sec. 504. Scrambling of cable channels for nonsubscribers.
Sec. 505. Scrambling of sexually explicit adult video service programming.
Sec. 506. Cable operator refusal to carry certain programs.
Sec. 507. Clarification of current laws regarding communication of obscene materials through the use of computers.
Sec. 508. Coercion and enticement of minors.
Sec. 509. Online family empowerment.

SUBTITLE B--VIOLENCE
Sec. 551. Parental choice in television programming.
Sec. 552. Technology fund.

SUBTITLE C--JUDICIAL REVIEW
Sec. 561. Expedited review.

TITLE VI--EFFECT ON OTHER LAWS
Sec. 601. Applicability of consent decrees and other law.

Sec. 602. Preemption of local taxation with respect to direct-to-home services.

TITLE VII--MISCELLANEOUS PROVISIONS

Sec. 701. Prevention of unfair billing practices for information or services provided over toll-free telephone calls.

Sec. 702. Privacy of customer information.

Sec. 703. Pole attachments.

Sec. 704. Facilities siting; radio frequency emission standards.

Sec. 705. Mobile services direct access to long distance carriers.

Sec. 706. Advanced telecommunications incentives.

Sec. 707. Telecommunications Development Fund.

Sec. 708. National Education Technology Funding Corporation.

Sec. 709. Report on the use of advanced telecommunications services for medical purposes.

Sec. 710. Authorization of appropriations.

SEC. 3. DEFINITIONS.

(a) ADDITIONAL DEFINITIONS- Section 3 (47 U.S.C. 153) is amended--

(1) in subsection (r)--

(A) by inserting '(A)' after 'means'; and

(B) by inserting before the period at the end the following: , or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service'; and

(2) by adding at the end thereof the following:

(33) AFFILIATE- The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.

-(34) AT&T CONSENT DECREE- The term 'AT&T Consent Decree' means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(35) BELL OPERATING COMPANY- The term 'Bell operating company'--

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York

(3) establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that –users have easy and complete access to the

information necessary to effectively utilize blocking technology and to encourage the availability thereof to low income parents.

SUBTITLE C--JUDICIAL REVIEW

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING- Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) APPELLATE REVIEW- Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

TITLE VI--EFFECT ON OTHER LAWS

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT

(l) AT&T CONSENT DECREE- Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject

to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE CONSENT DECREE- Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) MCCAW CONSENT DECREE- Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligations imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS

(l) SAVINGS CLAUSE- Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL- Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT- Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking 'Federal Communications Commission,'.

(c) FEDERAL, STATE, AND LOCAL LAW-

(l) NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or . . .

* * *

APPENDIX P

TELECOMMUNICATIONS ACT OF 1996

CONFERENCE REPORT

FEBRUARY 1, 1996.– Ordered to be printed

Mr. PRESSLER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.--This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; references.
Sec. 2. Table of contents.
Sec. 3. Definitions.

* * *

[Page 16-17]

"(5) DUTY TO NEGOTIATE NOT AFFECTED. -- The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

"(g)-CONSOLIDATION :OF STATE PROCEEDINGS.--Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act . . .

"(h) FILING REQUIRED.– A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filling the statement to cover the costs of approving and filing such agreement or statement.

"(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.– A local exchange carrier shall make available any inter-connection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement .

"(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.– For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h).

"SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.– No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

"(b) STATE REGULATORY AUTHORITY.– Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure

the continued quality of telecommunications services, and safeguard the rights of consumers.

"(c) STATE AND LOCAL GOVERNMENT AUTHORITY.-- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

"(d) PREEMPTION.- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

"(e) COMMERCIAL MOBILE SERVICE PROVIDERS.- Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

"(f) RURAL MARKETS. -- It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that

effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

"(2) to a provider of commercial mobile services.

"SEC. 254. UNIVERSAL SERVICE.

"(a) PROCEDURES TO REVIEW UNIVERSAL SERVICE REQUIREMENTS.-

"(1) FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE. - Within one month after the date of enactment of the Telecommunications Act of 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) and this section, including the definition of the Services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c), one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996.

"(2) COMMISSION ACTION.--The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after the date of enactment of the Telecommunications Act of 1996.

The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) UNIVERSAL SERVICE PRINCIPLES. - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

"(1) QUALITY AND RATES.— Quality services should be available at just, reasonable, and affordable rates.

"(2) ACCESS TO ADVANCED SERVICES. - Access to advanced telecommunications and information services should be provided in all regions of the Nation.

* * *

[Page 100-101]

. . . the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible

"(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such

rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).".

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.– Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY.–

"(A) GENERAL AUTHORITY.– Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS.–

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

"(II) shall not prohibit or have the effect of prohibiting

the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commissions' regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is

inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.- For purposes of this paragraph-

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home

satellite services (as defined in section 303(v))."

(b) RADIO FREQUENCY EMISSIONS.- Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY.- Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency s mission, or the current or planned use of the property rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

SEC. 705. MOBILE SERVICES DIRECT ACCESS TO LONG DISTANCE CARRIERS.

Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(8) MOBILE SERVICES ACCESS.- A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal . . .

* * *

APPENDIX Q

COMMUNICATIONS AMENDMENTS ACT
P.L. 97-259

COMMUNICATIONS AMENDMENTS ACT OF 1982-NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

P.L. 97-259, see page 96 Stat. 1087

House Report (Energy and Commerce Committee) No. 97-84, May 19, 1981 [To accompany H.R. 3239]
Senate Report (Commerce, Science, and Transportation Committee)
No. 97-191, Sept. 18, 1981 [To accompany S. 929]
Senate Report (Commerce, Science, and Transportation Committee)
No. 97-404, May 19, 1982 [To accompany S. 2181]
House Conference Report No. 97-765, Aug. 19, 1982
[To accompany H.R. 3239]
Cong. Record Vol. 127 (1981)
Cong. Record Vol. 128 (1982)
DATES OF CONSIDERATION AND PASSAGE
House June 9, 1981; August 19, 1982
Senate September 25, 1981; June 9, August 18, 19, 1982

The House bill was passed in lieu of the Senate bills after amending its language to contain much of the text of the Senate bills. The Senate Reports (this page and page 2256) and the House Conference Report (page 2261) are set out.

SENATE REPORT NO. 97-191

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 929) to amend, the Communications Act of 1934 to provide for improved administration of the amateur radio service and private land mobile and fixed services by the Federal Communications Commission, to address the problem of radio-frequency interference to certain electronic equipment, to permit volunteer assistance to the Federal Communications Commission in the area of examinations, licensing, and enforcement in the amateur radio service, and/or other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title and recommends that the bill do pass.

PURPOSE

S. 929, as reported, accomplishes the following:

1. grants the Federal Communications Commission (FCC) the authority to establish minimum radio frequency rejection standards for electronic home entertainment equipment, including television receivers, thus making such equipment less susceptible to interference from other electronic equipment such as CB (Citizens Band) radio, amateur radio, and the like;

2. exempts from such radio-frequency rejection standards, as may be established by the FCC, any electronic equipment manufactured prior to the enactment of the bill;

* * *

LEGISLATIVE HISTORY
P.L. 97-259
[page 32]

. . . often at considerable expense. In most instances, once the expert evidence is made available, the defendants plead guilty and the case terminated.

The provision would end these wasteful proceedings. Further, it would make Section 301 consistent with judicial decisions holding that all radio signals are interstate by their very nature. See, e.g., *Fisher's Blend Station Inc. v. Tax Commission of Washington State,* 297 U.S. 650, 655 (1936).

INTERFERENCE WITH ELECTRONIC EQUIPMENT
House bill

The House bill contained no provision.

Senate amendment

The Senate amends Section 302(a) of the Communications Act of 1934 and authorizes the Commission to establish minimum performance standards for "home electronic equipment and systems" to take appropriate action in order to protect such equipment from radio frequency interference (RFI).

Conference substitute

The conference substitute adopts the Senate provision.

For many years, public complaints have persisted about radio frequency interference to consumer electronic equipment, such as televison sets and radio receivers. This interference has often been attributed to transmissions from the Amateur and Citizens Band (CB) radio services.

The Conferees wish to emphasize that it was its hope that voluntary efforts by manufacturers to reduce RFI when possible, as opposed to the use of government regulation, would be sufficient. Devices designed and marketed for use in a commercial environment normally include necessary protection against interference and do not require Commission regulation. In the market for home devices, however, good faith industry attempts to solve this interference problem have not always been as successful. Thus, in view of complaints regarding home devices, the Conferees believe that Commission authority to impose appropriate regulations on home electronic equipment and systems is now necessary to insure that consumers' home electronic equipment and systems will not be subject to malfunction due to RFI. However, the legislation does not mandate Commission exercise of this authority; that decision is well within the technical expertise of the agency.

The Conferees intend that the Commission's authority apply only to "home electronic equipment and systems" likely to be found in a private residence and intended for residential use, as distinguished from devices intended for office and business use. Radio and television sets would be typical examples of equipment subsumed under the term "home electronic equipment and systems." Other examples include home burglar alarm and security systems, automatic garage door openers, electronic organs, record turntables, and

stereo/high fidelity amplifier systems. Although this legislation is aimed primarily at home equipment and systems, it is not intended to prevent the Commission from adopting standards for such devices which are also used outside the home. Portable TV receivers and radios as well as medical alert devices, for instance, are intended to be covered.

A number of alternatives are available to the Commission in exercising the authority granted hereunder. The Commission could direct manufacturers of some types of home electronic equipment and systems to meet certain minimal standards by incorporating an interference suppression capability into their devices before the equipment is offered for sale. On the other hand, the Commission may choose to require only a warning label on those types of home electronic equipment and systems for which the installation of filtering, shielding or other interference suppression components would be unreasonably costly in relation to the total price of the device, or where such installation otherwise is unreasonable or impractical. Such a warning could be given in a pamphlet or tag accompanying the equipment, and marketplace forces would determine the success of particular competitors who chose to rely on such warnings instead of actually building in the filtering devices necessary to fully protect against interference.

The Conferees expect the Commission to exercise the authority granted herein, as it has exercised the authority granted under section 302 of the Communications Act of 1934, by balancing the cost of improving the performance of a device to particular levels against the benefit to be gained from requiring manufacturers to meet standards of various levels of stringency. In so doing, the Conferees expect the

number of interference complaints recorded and investigated by the Commission to be significantly reduced.

The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

QUALIFICATIONS OF STATION OPERATORS

House bill

The House bill contained no provision.

Senate amendment

Section 303(1) of the Communications Act authorizes the Commission to grant radio operator licenses to citizens and nationals of the United States. The Senate broadened this category to include aliens who are legally eligible for employment in the United States.

Conference substitute

The conference substitute adopts the Senate provision.

APPENDIX R

S 652 EAH

In the House of Representatives, U. S.,
October 12, 1995.

[Italic->] Resolved, [<-Italic] That the bill from the Senate (S. 652) entitled 'An Act to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes', do pass with the following

[Italic->]'AMENDMENTS: [<-Italic]

Strike out all after the enacting clause and insert:

SECTION 1. -- SHORT TITLE; REFERENCES; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the 'Communications Act of 1995'

(b) REFERENCES- References in this Act to 'the Act' are references to the Communications Act of 1934.

(c) TABLE OF CONTENTS-

Sec. 1. Short title; references; table of contents.

TITLE I--DEVELOPMENT OF COMPETITIVE TELECOMMUNICATIONS MARKETS

Sec. 101. Establishment of part II of title II.

PART II--DEVELOPMENT OF COMPETITIVE MARKETS

Sec. 102. Competition in manufacturing, information services, alarm services, and pay phone services.

PART III-SPECIAL AND TEMPORARY PROVISIONS
Sec. 103. Forbearance from regulation.
Sec. 104. Online family empowerment.
Sec. 105. Privacy of customer information.
Sec. 106. Pole attachments.
Sec. 107. Preemption of franchising authority regulation of telecommunications services.
Sec. 108. Facilities siting; radio frequency emission standards.
Sec. 109. Mobile service access to long distance carriers.
Sec. 110. Freedom from toll fraud.
Sec. 111. Report on means of restricting access, to unwanted material in interactive telecommunications systems.
Sec. 112. Telecommunications development fund.
Sec. 113. Report on the use of advanced telecommunications services for medical purposes.
Sec. 114. Telecommuting public information program.
Sec. 115. Authorization of appropriations.
TITLE II-- CABLE COMMUNICATIONS COMPETITIVENESS
Sec. 201. Cable service provided by telephone companies.
PART V-- VIDEO PROGRAMMING SERVICES PROVIDED BY TELEPHONE COMPANIES
Sec. 202. Competition from cable systems.
Sec. 203. Competitive availability of navigation devices.
Sec. 204. Video programming accessibility.
Sec. 205. Technical amendments.
TITLE III BROADCAST COMMUNICATIONS COMPETITIVENESS
Sec. 301. Broadcaster spectrum flexibility.
Sec. 302. Broadcast ownership.
Sec. 303. Foreign investment and ownership.
Sec. 304. Family viewing empowerment.

Sec. 305. Parental choice in television programming.
Sec. 306. Term of licenses.
Sec. 307. Broadcast license renewal procedures.
Sec. 308. Exclusive Federal jurisdiction over direct broadcast satellite service.

U.S.C. 541(c)) is amended by adding at the end thereof the following new paragraph:

(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services

(i) such cable operator or affiliate shall not be required to obtain a franchise under this title; and

(ii) the provisions of this title shall not apply to such cable operator or affiliate.

(B) A franchising authority may not impose any requirement that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof–

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of s6ch cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator

to provide any telecommunications service or facilities, other than intragovernmental telecommunications services, as a condition of the initial grant of a franchise or a franchise renewal.

(b) FRANCHISE FEES- Section 622(b) of the Act (47 U.S.C. 542(b)) is amended by inserting 'to provide cable services' immediately before the period at the end of the first sentence thereof.

SEC. 108. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS..

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY- Section 332(C) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) FACILITIES SITING POLICIES- (A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy to reconcile State and local regulation of the siting of facilities for the provision of commercial mobile services or unlicensed services with the public interest in fostering competition through the rapid, efficient, and nationwide deployment of commercial mobile services or unlicensed services.

(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and Public safety agencies.

(C) The policy prescribed pursuant to this subparagraph shall take into account–

(i) the need to enhance the coverage and quality of commercial mobile services and unlicensed services and foster competition in the provision of commercial mobile services and unlicensed services on a timely basis;

(ii) the legitimate interests of State and local governments in matters of exclusively local concern, and the need to provide State and local government with maximum flexibility to address such local concerns, while ensuring that such interests do not prohibit or have the effect of precluding any commercial mobile service or unlicensed facilities siting on interstate commerce:

(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services or unlicensed services; and

(v) the need to provide due process in making any decision by a State or local government or instrumentality thereof to grant or deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services or unlicensed services.

(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to

the extent that such facilities comply with the Commission's regulations concerning such emissions.

(E) The proceeding to prescribe such policy pursuant to this paragraph shall supercede any proceeding pending on the date of enactment of this paragraph relating to preemption of State and local regulation of tower siting for commercial mobile services, unlicensed services, and providers thereof. In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.

(F) For purposes of this paragraph, the term 'unlicensed service' means the offering of telecommunications using duly authorized devices which do not require individual licenses.'.

(b) RADIO FREQUENCY EMISSIONS Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY- Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of

property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

SEC. 109. MOBILE SERVICE ACCESS TO LONG DISTANCE CARRIERS.

(a) AMENDMENT- Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

> (8) MOBILE SERVICES ACCESS- (A) The Commission shall prescribe regulations to afford subscribers of two-way switched voice commercial mobile radio services access to a provider of telephone toll service of the subscribers . . .

APPENDIX S

47 CFR Sec. 73.88

Title 47
CHAPTER I
SUBCHAPTER C
PART 73
Subpart A

Sec. 73.68 Blanketing interference.

The licensee of each broadcast station is required to satisfy all reasonable complaints of blanketing interference within the 1 V/m contour.
(28 FR 13574, Dec. 14, 1963)

APPENDIX T

47 CFR. Sec. 73.318

Title
47 CHAPTER I
SUBCHAPTER C
PART 73
Subpart B

Sec. 73.318 FM blanketing interference.

Areas adjacent to the transmitting antenna that receive a signal with a strength of 115 dBu (562 mV/m) or greater will be assumed to be blanketed. In determining the blanketed area, the 115 dBu contour is determined by calculating the inverse distance field using the effective radiated power of the maximum radiated lobe of the antenna without considering its vertical radiation pattern or height. For directional antennas, the effective radiated power in the pertinent bearing shall be used.

(a) The distance to the 115 dBu contour is determined using the following equation:
D (in kilometers) - 0.394(degree) P
D (in miles) - 0.245 (degree) P
Where P is the maximum effective radiated power (ERP), measured in Kilowatts, of the maximum radiated lobe.

(b) After January 1, 1985, permittees or licensees who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit must satisfy all complaints of

blanketing interference which are received by the station during a one year period. The period begins with the commencement of program tests, or commencement of programming utilizing the new antenna. Resolution of complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

(c) A permittee collocating with one or more existing stations and beginning program tests on or after January 1, 1985, must assume full financial responsibility for remedying new complaints of blanketing interference for a period of one year. Two or more permittees that concurrently collocate on or after January 1, 1985, shall assume shared responsibility for remedying blanketing complaints. Within the blanketing area unless an offending station can be readily determined and then that station shall assume full financial responsibility,

(d) Following the one year period of full financial obligation to satisfy blanketing complaints, licensees shall provide technical information or assistance to complainants on remedies for blanketing interference.

(28 FR 13623, Dec. 14. 1963, as amended at 52 FR 25866 July 9, 1987)

APPENDIX U

47 CFR Sec. 15.17

Title 47
CHAPTER I
SUBCHAPTER A
PART 15
Subpart A

Sec. 15.17 Susceptibility to interference.

(a) Parties responsible for equipment compliance are advised to consider the proximity and the high power of non-Government licensed radio stations, such as broadcast, amateur and land mobile stations, and of U.S. Government radio stations when choosing operating frequencies during the design of their equipment so as to reduce the susceptibility for receiving harmful interference. Information on non-Government use of the spectrum can be obtained by consulting the Table of Frequency Allocations in Sec. 2.106 of this chapter.

(b) Information on U.S. Government operations can be obtained by contacting: Director, Spectrum Plans and Policy, National Telecommunications and Information Administration, Department of Commerce, Room 4096, Washington, DC 20230.

APPENDIX V

S. REP. 104-230

. . . such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.

SECTION 704 FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS

Senate bill

No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment.

The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State end local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act end section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

APPENDIX W

UNION CALENDAR NO. 105
104th CONGRESS - 1ST SESSION

A BILL

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

July 24, 1995

Reported from the Committee on Commerce with an amendment Committee on the Judiciary discharged, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

HR 1555 RH

104th CONGRESS

1st Session

[Report No. 104-204, Part 1]

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

IN THE HOUSE OF REPRESENTATIVES

May 3, 1995

Mr. BULEY (for himself, Mr. DINGELL, Mr. FIELDS of Texas, Mr. MOORHEAD, Mr. OXLEY, Mr. BIURAKIS, Mr. SCHAEGER, Mr. BARTON of Texas, Mr. HASERTS, Mr. STEARNS, Mr. PAXON, Mr. GILLMORE, Mr. KLUG, Mr. GREENWOOD, Mr. CRAPO, Mr. FRISA, Mr. WHITE, Mr. COBURN, Mr. TAUZIN, Mr. HALL of

Texas, Mr. BOUCHER, Mr. MANTON, Mr. TOWNS, Ms. ESHOO, and Mrs. LINCOLN Introduced the following bill, which was referred to the Committee on Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker. In each case for consideration of such provisions as fell within the jurisdiction of the committee concerned.

July 24, 1995

Reported from the Committee on Commerce with an amendment

[STRIKE OUT ALL AFTER THE ENACTING CLAUSE AND INSERT THE PART PRINTED IN ITALICS]

Referral to the Committee on the Judiciary extended for a period ending not later than July 24, 1995.

Additional sponsors: Mr. DEUTSCH, and Mr. COX of California Committee on the Judicial discharged, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed.

(FOR TEXT OF INTRODUCED BILL, SEE COPY OF BILL AS INTRODUCED ON MAY 3, 1995)

A BILL

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

[italics] Be it enacted by the Senate and House of Representatives of the United States of American to Congress assembled (italic)

SECTION 1. SHORT TITLE, REFERENCES, TABLE OF CONTENTS.

(a) SHORT TITLE - This Act may be cited as the "Communications Act of 1995"

(b) REFERENCES - References in this Act to "the Act" are references to the Communications Act of 1934.

(c) TABLE OF CONTENTS

Sec. 1. Short title table of contents.

TITLE 1 - DEVELOPMENT OF COMPETITIVE TELECOMMUNICATIONS MARKETS

Sec. 101. Establishment of part II of title II.

PART II - DEVELOPMENT OF COMPETITIVE MARKETS

Sec. 102. Competition in manufacturing information services, alarm services, and pay phone services.

PART III - SPECIAL AND TEMPORARY PROVISIONS

Sec. 103. Forbearance from regulation.

Sec. 104. Privacy of customer information.

Sec. 105. Pole attachments.

Sec. 106. Preemption of franchising authority regulation of telecommunications services.

Sec. 107. Facilities siting radio frequency extension standards.

Sec. 108. Mobile service access to long distance carriers.

(a) TELECOMMUNICATIONS SERVICES - Section 621(b) of the Act (47 U.S.C. 541(c)) is amended by adding at the end thereof the following new paragraph:

(3)(A) To the extent that a cable operator or affiliate thereof is engaged in the provision of telecommunications services –

(f) such cable operator or affiliate shall not be required to obtain a franchise under this title; and

(g) the provisions of this title shall not apply to such cable operator or affiliate.

(B) A franchising authority may not impose any requirement that has the purpose or effect of prohibiting,

limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof–

(f) to discontinue the provision of a telecommunications service, or

(g) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

(D) A franchising authority may not require a cable operator to provide any telecommunications service or facilities as a condition of the initial grant of a franchise or a franchise renewal.

(b) FRANCHISE FEES. - Section 622(b) of the Act (47 U.S.C. 542(b)) is amended by inserting "to provide cable services" immediately before the period at the end of the first sentence thereof.

SEC. 107. FACILITIES SITTING, RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITTING POLICY - Section 332(c) of the Act (47 U.S.C. 332(d) is amended by adding at the end the following paragraph:

(7) FACILITIES SITTING POLICIES - (A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

(B) Pursuant to the subchapter II of chapter5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries and public safety agencies in negotiating and developing such a policy, the committee shall take into account–

(i) the desirability of enhancing the coverage and quality of commercial n ile services and fostering competition in the provision of such services.

(ii) the legitimate interests of State and local governments in interests of State and local governments in matters of exclusively local concern.

(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

(iv) the administrative costs to State and local governments of referring requests for authorization to locate facilities for the provision of commercial mobile services.

(C) The policy prescribed pursuant to this paragraph shall ensure that–

(1) regulation of the placement, construction and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof–

(i) is reasonable, non-discriminatory, and limited to the minimum necessary to accomplish the State or local governments legitimate purposes; and

(ii) does not prohibit or have the effect of precluding any commercial mobile service; and

(iii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify or operate facilities for the provision of

commercial mobile services within a reasonable period fo time after the request is fully filed with such government or instrumentality; and

(3) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiation rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.'.

(b) RADIO FREQUENCY EMISSIONS. Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docker 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

APPENDIX X

FCC 93-142
58 FR 19393

In the Matter of

Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation

ET Docket No. 93-62

Adopted:	March 11, 1993
Released:	April 8, 1993
Comments Due:	August 13, 1993
Reply Comments Due:	September 13, 1993

NOTICE OF PROPOSED RULE MAKING

By the Commission: (*Commission Marshall not participating, Commissioner Duggan issuing a statement).*

INTRODUCTION

1. By this action, we are proposing to amend and update the guidelines and methods used for evaluating effects of radiofrequency (RF) radiation from FCC regulated facilities. Specifically, we are proposing to use the new standard for RF exposure recently adopted by the American National Standards Institute (ANSI) in association with the Institute of Electrical and Electronics Engineers, Inc. (IEEE), ANSI/IEEE C95.1-1992. This standard was adopted by

ANSI on November 18, 1992, and is generally more restrictive than the 1982 ANSI standard, ANSI C95.1-1082, that is specified currently in our rules for evaluating the environmental effects of RF radiation. This proposal could affect a wide variety of radio services, e.g. AM, FM, and TV broadcast services; common-carrier land-mobile services; and private-radio land-mobile services.

BACKGROUND

2. The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to evaluate the effects of their actions on the quality of the human environment.4(4) To meet its requirements under NEPA, the Commission has adopted rules for evaluating the environmental impact of its actions. One of the environmental factors considered under these rules is human exposure to RF radiation from FCC-regulated transmitters and facilities.

3. In 1985, the Commission adopted the 1982 ANSI guidelines for use in evaluating the effects of RF radiation exposure on the environment. The Commission found that these guidelines were widely accepted technically and would meet its needs for evaluating environmental RF radiation. The 1982 ANSI RF exposure guidelines were developed by a panel of experts based on the best scientific information available at the time concerning safe levels of exposure to RF radiation for workers and the general public.

4. The Commission's rules now require applicants for certain facilities to prepare an Environmental Assessment (EA) if the transmitter or facility in question would expose the general public or workers to RF levels in excess of those

recommended by the 1982 ANSI guidelines. Examples of facilities which have the potential to cause exposures in excess of these guidelines include: radio and television broadcast stations; satellite uplinks; FM booster and translator stations transmitting in excess of 100 watts; and MDS and ITFS stations transmitting in excess of 200 watts. The rules also address other related matters such as the evaluation of multiple transmitter sites.

5. Many low-power, intermittent, or normally inaccessible RF transmitters and facilities have been categorically excluded from our rules regarding RF radiation evaluation based on calculations and measurement data indicating that they would not cause exposures that would violate the ANSI guidelines under normal and routine conditions of use. The Commission has "categorically excluded" such classes of transmitters from routine environmental evaluation with respect to RF radiation. Examples of currently excluded transmitters and facilities include: private land-mobile, cellular radio, and amateur radio stations. These exclusions were based primarily on considerations regarding the excluded transmitters' relative low operating power, intermittent operation or inaccessibility.

6. On November 18, 1992, ANSI adopted a new standard for RF exposure, designated ANSI/IEEE C95.1-1992. This new standard contains a number of significant differences from the guidelines and recommendations issued by ANSI in 1982. In many respects the 1992 guidelines are more restrictive in the amount of environmental RF exposure permitted, and they also extend the frequency range under consideration to cover frequencies from 3 kHz to 300 Ghz. The new 1992 guidelines specify two sets of exposure

recommendations, one for "controlled environments" (usually involving workers) and another for "uncontrolled environments" (usually involving the general public). The 1982 guidelines specified only one set of exposure limits, regardless of whether the individual exposed was a worker or a member of the general public.

7. The 1992 guidelines also, for the first time, include specific restrictions on currents induced in the human body by RF fields. In addition, the guidelines contain significant changes in allowable exclusions and power levels permitted for certain low-power devices, such as hand-held radiotelephones and cellular radios. For example, the 1982 guidelines permit exclusion if the input power of the radiating device at frequencies between 300 kHz and 1 Ghz is seven watts or less. The 1992 guidelines would reduce this power exclusion significantly for devices that operate in uncontrolled environments and for devices that operate on frequencies above 450 MHz in controlled environments. The 1992 guidelines also contain a further restriction that would not permit the application of the power exclusion to hand-held devices where the radiating structure is maintained at 2.5 cm or less from the body.

DISCUSSION

8. The Commission's environmental rules are intended to ensure that, consistent with NEPA, and FCC-regulated transmitters and facilities that expose the public or workers to levels of RF radiation that are considered by expert organizations to be potentially harmful undergo environmental processing. The Commission, however, is not the expert agency for evaluating the effects of RF radiation on human

agency for evaluating the effects of RF radiation on human health and safety. Therefore, it uses standards and guidelines developed by those with appropriate expertise. As noted above, since 1985, the Commission has relied on the 1982 ANSI RF exposure guidelines in connection with its responsibilities under NEPA regarding the evaluation of potential RF environmental hazards.

9. As part of its procedures for periodically reevaluating its standards ANSI has recently approved a new RF exposure standard, in association with the IEEE, that is based on additional research and study in the area of RF effects. In view of ANSI's adoption of this revision of the 1982 RF exposure guidelines, we believe that it is now incumbent upon us to consider updating the RF exposure standards specified in our rules. We are, therefore, proposing to replace the 1982 ANSI guidelines with the new 1992 ANSI/IEEE guidelines (ANSI/IEEE C95.1-1992) for purposes of evaluating environmental significance. These new guidelines are more up to date with respect to scientifically-based criteria for use in evaluating human exposure to RF radiation. They will ensure that FCC-regulated facilities comply with the latest safety standards for RF exposure.

10. As noted above, the 1992 ANSI/IEEE guidelines contain significant differences from the guidelines currently used by the Commission. We recognize that evaluating the biological effects of RF and microwave energy is a complex and controversial subject and that the adoption of new guidelines will raise a number of issues and implementation concerns. These include among other things: the definitions of "controlled" and "uncontrolled" environments; new requirements regarding induced and contact RF currents;

band; differences between the new guidelines and other RF exposure guidelines; treatment of hand-held devices; and the impact on existing facilities and devices. These matters are discussed below, and we invite comments regarding them.

11. We also intend to solicit comments from expert health and safety agencies within the Federal Government, including the U.S. Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health. In addition, we plan to confer with the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce, in the interest of developing a consistent approach to the treatment of RF exposure environments for the private sector and Federal Government. NTIA has responsibility for authorizing and managing the Federal Government's use of the RF spectrum.

Definition of "Controlled" and "Uncontrolled" Environment

APPENDIX Y

FCC 96-326

* * *

. . . adopting ARRL's proposal that amateur operators should be required to certify, as part of their license application process, that they have read and understand our bulletins and the relevant FCC rules.[197] We will rely on our Wireless Telecommunications Bureau to develop suitable methods for obtaining this certification.

C. Federal Preemption

164. In the past, parties have requested that the Commission preempt state and local authority over RF exposure matters.[198] To date the Commission has declined to preempt on health and safety matters. However, the Commission has noted that should non-Federal RF radiation standards be adopted that adversely affect a licensee's ability to engage in Commission-authorized activities, the Commission would consider reconsidering whether Federal action is necessary.[199]

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[197] A.R.R.L. Comments at 17. A.R.R.L. Bio-Effects Committee Comments at 5.

[198] See. 5 FCC Rcd 486 (1990).

[199] See. GEN Dkt 79-144. Report and Order. 100 FCC 2d at 558.

165. In the Notice, we did not discuss Federal preemption of state and local regulations regarding RF radiation exposure. However, many commenters request that we address this matter by establishing Federal preemption of state and local regulations concerning RF radiation exposure.[200] Two Petitions for Rule Making have been filed in this docket requesting a Further Notice of Proposed Rule Making to address the preemption of non-Federal government regulations concerning RF radiation hazards.[201] The Village of Wilmette, Illinois. and Ergotec Association, Inc. in late-filed reply comments, oppose federal preemption of local RF exposure regulations.

166. Decision. In the past the Commission has hesitated to intrude on the ability of states and localities to make regulations affecting health and safety. Many of the comments indicate that a patchwork of divergent local and Stale regulations could pose a burden on interstate communications. However, since these comments were filed, Congress his passed the Telecommunications Act of 1996. Pub. L. No. 104-104. 110 Stat, 56 (1996). Section 704 of the Telecommunications Act amends the Communications Act by providing for federal preemption of state and local regulation

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[200] See, for example, comments of MSTV/NBC, McCaw, PacTel, Hammer & Edison, Joint Broadcasters, Celpage, Ericsson, AMSC, the New Jersey Broadcasters Association, and ARRL.

[201] See, Electromagnetic Energy Association (formerly EEPA). Petition for Further Notice of Proposed Rulemaking and Hammett & Edison Comments requesting that it serve as a Petition for Rule Making concerning the preemption of state and local RF regulations.

of personal wireless service facilities on the basis of RF environmental effects.[202] The Telecommunications Act also provides for resolution of conflicts related to the regulation of RF emissions by the courts or by petition to the Commission.[203] Accordingly. we are amending § 1.1307 of our rules to incorporate the provisions of Section 704 of the Telecommunications Act.

167. The Telecommunications Act does not preempt state or local regulations relating to RF emissions of broadcast facilities or other facilities that do not fall within the definition

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[202] Telecommunications Act of 1996, Section 704. Facilities Siting: Radio Frequency Emission Standards. See, 704(a)(7)(B)(iv). This section states that: No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

[203] Telecommunications Act of 1996. Section 704(a)(7)(B)(v). This section states that, "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief."

of personal wireless services.[204] It would appear from the comments that a few such regulations have been imposed, generally as a result of health and safety concerns. At this point, it does not appear that the number of instances of state and local regulation of RF emissions in non-personal wireless services situations is large enough to justify considering whether or not they should be preempted. We have traditionally been reluctant to preempt state or local regulations enacted to promote bona fide health and safety objectives. We have no reason to believe that the instances cited in the comments were motivated by anything but bona fide concerns.

168. We believe that the regulations that we are adopting herein represent the best scientific thought and are sufficient to protect the public health. Once states and localities have had an opportunity to review and analyze the guidelines we are adopting, we expect they will agree that no further state or local regulation is warranted. Should our expectations prove to be misplaced and should FCC licensees encounter a pattern of state or local activities which constitute an obstacle to the scheme of federal control of radio facilities set forth in the Communications Act, they should present us with such evidence as well as their view of the legal basis which could justify FCC preemption of state and local ordinances. At this time, however. we deny the petitions from the EEA and from Hammett and Edison, as well as the

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[204] Section 704(a)(C)(i) of the Act defines "personal wireless services" to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."

comments from several parties, requesting a broad-based preemption policy to cover all transmitting sources.

V. CONCLUSION

169. To protect public health with respect to RF radiation from FCC-regulated transmitters, and to fulfill our responsibilities under NEPA, we are updating our guidelines for evaluating the environmental impact of RF emissions. We believe that the guidelines we are adopting will be of benefit both to the public and to the telecommunications industry. They will provide assurance that recent scientific knowledge is taken into account regarding future decisions on approval of FCC-authorized facilities and equipment

VI. ORDERING CLAUSES

170. Section 704(b) of the Telecommunications Act of 1996 requires that we prescribe and make effective these new rules by August 6, 1996. Accordingly, we find that good cause exists, pursuant to 5 U.S.C. Sec. 553(d)(3), to make these rules effective upon publication in the Federal Register rather than to follow the normal practice of making them effective 30 days after publication in the Federal Register.[205] Completion of this rulemaking has required an extensive amount of work to resolve extremely complex issues, in addition coordination with the various affected federal

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[205] See note 4, supra. Unlike other sections of that Act, see, e.g., Secs. 251(d)(d)(I), which directs us to "complete" action, and Sec. 254(a)(2), which directs us to "promulgate" rules. Sec. 704 requires that RF exposure guidelines be made effective within the prescribed 180 day time period.

agencies through to the Interdepartment Radio Advisory Committee has consumed more time than anticipated. The time required to review the comments, decide on the best possible guidelines and coordinate that decision with other federal agencies has made it impossible to delay the effective date for 30 days and still meet the Congressionally imposed deadline. Thus, we have no alternative but to make these rules effective immediately. We note that the Notice in this proceeding was first issued in 1993. In addition, we note that the Telecommunications Act of 1996, containing a deadline for implementation, was enacted in early February of this year. Therefore, most parties to this proceeding have had considerable notice of the likely actions we would be taking, and they should have had sufficient opportunity to prepare for the implementation of new guidelines pursuant to the implementation schedule set forth above.

171. Accordingly, pursuant to the authority contained in Sections 4(i), 7(a), 303(c), 303 (g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended. 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r) and 332(c)(7). IT IS ORDERED, that effective August 6. 1996, Parts 1, 2, 15, 24, and 97 of the Commission's Rules and Regulations, 47 CFR Parts 1, 2, 15, 24, and 97, ARE AMENDED as specified in Appendix C.

APPENDIX Z

ENGINEERING REPORT
WIZN-FM SITE, PEASE MOUNTAIN

Interference Study and Recommendations

May 10, 1996

David W. Groth
Communications Consultant
R.D. 2, Box 375
Red Hook, New York
TEL (914) 758-1200
FAX (914) 758-0647

INTRODUCTION

David W. Groth d/b/a Radio Engineering Services has been retained by Deer River Broadcasting Group, owners and operators of WIZN-FM radio to conduct an investigation into the interference, and safety issues regarding the WIZN-FM transmission site, located on Pease Mountain, in the Town of Charlotte.

Data was gathered by visiting with and interviewing respondents at various distances from the tower, as well as direct measurements and observations made within the blanketed area.

In addition, the radio transmitter site was visited, and measurements were made of the transmitted signal to

determine compliance with Federal Communications Commission (F.C.C.) rules and regulations.

TRANSMITTER SITE

The transmitter site was visited on March 18, 1996, and again on April 13, 1996. During both inspections, power output, operating carrier frequency, modulation (audio loudness) and radio frequency harmonic distortion were measured and recorded.

A sampling was inserted in the main transmission line at the output of the transmitter harmonic filter, and connected to a Tektronix type 2710 spectrum analyzer. This analyzer was last factory calibrated to a factory traceable standard on July 10, 1995. WIZN compliance was determined by comparison of licensed values stated in the stations license, (see exhibit B) with measurement and observation of operating parameters at the transmitter.

The licensed carrier frequency of 106.700 Megahertz was observed at 106.699975 Megahertz. This is 25 Hertz low and within 1% of F.C.C. regulations.

Next, power output of the station was observed on the stations Bird wattmeter at 24,200 Watts. This is within 1.2% of the authorized operating transmitter power output. The F.C.C. high and low limits for operating power are +5% and -10%, respectively.

The frequency deviation or frequency modulation (FM) was measured at 74.2 Kilohertz. The allowable limit for this parameter is 75__ Kilohertz. (Khz).

Harmonic energy also measured. FM radio transmitters contain signals at their output that are harmonically related to the main carrier signal by some multiple. These are known as "harmonics". FM radio transmission systems are required to suppress or attenuate these harmonics by a factor of 43 + 10Log (power in watts). Therefore, WIZN must attenuate harmonics by 86.89 Decibels (Db) below the level of the main carrier signal. The WIZN second harmonic was found to be suppressed by 87 decibels. This parameter is just within compliance.

The third harmonic was found to be suppressed by 81 decibels. This is slightly out of compliance, but will not cause or increase the magnitude of problems experienced in receiving WIZN on amplifiers, stereos or televisions. A slight retuning of the transmitter, or an additional installed low pass filter section (at the WIZN transmitter) would easily restore this parameter to beyond the compliance threshold.

Spurious emissions are those which are present in the transmitted output signal, but which are not harmonically related to the main carrier. In this case, no measurable signals were found in this category which exceeded -87Db.

Occupied bandwidth was also measured. F.C.C. rules part 73.317 state that he emmisions of the transmitter due to modulation products must be at least 25 Db below the level of the unmodulated carrier at a frequency distance of 120 Khz to 240 Khz. Modulation products at a frequency distance to 400 Khz, must be at a level of 35 Db below carrier. The spectrum analyzer indicate 28 Db and 40 Db respectively.

Synchronous and asynchronous amplitude modulation (AM) noise was also measured using a wideband oscilloscope and detector circuit. Synchronous noise, while not a parameter closely watched by the F.C.C., does, in my experience, tend to cause some devices with audio (sound) amplifiers to respond to FM signals in a way that audio sounds are identified. While not abnormally high, the measured synchronous AM noise was found to be 42 Db below the main carrier level. This figure was greatly improved by adjusting the transmitters intermediate driver stage, and by retuning the amplifier stages. The noise floor is now at -55Db.

Other sources of AM noise at an FM transmitter include poor grounding techniques, and loose mechanical hardware on towers. The WIZN transmitter and transmission line did appear to be properly grounded; however, the condition of the tower hardware is not known, and is not a part of this report.

CONSUMER APPLIANCE PROBLEMS

Engineers have known for some time now that radio transmissions can be unintentionally received on sound systems, telephones, and monitoring devices. This is precisely the reason why the F.C.C. has established rules and regulations pertaining to the use of transmitters and other consumer devices and radio equipment. Section 73.318 of F.C.C. rules states that radio broadcasting stations are responsible for resolving complaints within the "blanketed area". This area is defined as the radial distance from the FM transmitter to the 115Dbu signal contour. In the case of WIZN, that distance is 2.8 Kilometers, and the blanketed area

can be seen on "Exhibit A", included with this report. Further, the F.C.C. states that interference is defined as occurring if someone cannot receive another desired FM radio station within its primary coverage area, due to WIZN, when using a fixed receiver and antenna properly installed. It is important to note here that improperly installed receivers, (and a receiver without an antenna and a ground wire attached is not properly installed) are not covered by this rule. Certain devices such as telephones, stereos, intercoms and monitors, and amplifiers are excluded from the blanketed interference rules. Exhibit A1 is a reprint of these rules.

The station is required to satisfy all legitimate complaints received during the first year of operation, the commencement of that period determined by the first date at which program transmissions begin.

The F.C.C. does not offer interference protection to distant radio stations that do not principally serve the community of the complainant, and this is clearly stated.

Further, the rules clearly state that blanketing requirements only pertain to television and FM radio receivers, and this is further iterated in F.C.C. bulletin 16 which is routinely sent to complainants who communicate with the F.C.C. regarding other forms of interference. It is also stated in the bulletin and in part 73 of the rules that stereos, intercoms, amplifiers, and other devices of this nature are <u>not</u> covered, and directs the consumer to contact the dealer or manufacturer of the device for assistance.

To determine the nature and severity of complaints, I visited a number of homes within the blanketed contour, most

within ½ mile of the transmitter site. Fred Lavenberg, the radio stations chief engineer, assisted me with many of the visits. I recorded observations, including devices affected, how devices were connected and utilized, and th relative field intensity of the signal, and distance from the WIZN transmitter. The following is a list of devices affected, and a few examples at specific residences.

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APPENDIX AA

P.L. 97-259, COMMUNICATIONS AMENDMENTS ACT OF 1982-

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION SEE PAGE 96 STAT. 1087 HOUSE REPORT (ENERGY AND COMMERCE COMMITTEE) NO. 97-84, MAY 19, 1981 (TO ACCOMPANY H.R. 3239) SENATE REPORT (COMMERCE, SCIENCE, AND TRANSPORTATION COMMITTEE) NO. 97-191, SEPT. 18, 1981 (TO ACCOMPANY S. 939) SENATE REPORT (COMMERCE, SCIENCE, AND TRANSPORTATION COMMITTEE) NO. 97-404, MAY 19, 1982 (TO ACCOMPANY S. 2181) HOUSE CONFERENCE REPORT NO. 97-765, AUG. 19, 1982 (TO ACCOMPANY H.R. 3239) CONG. RECORD VOL. 127 (1981) CONG. RECORD VOL. 128 (1982) DATES OF CONSIDERATION AND PASSAGE HOUSE JUNE 9, 1981; AUGUST 19, 1982 SENATE SEPTEMBER 25, 1981; JUNE 9, AUGUST 18, 19, 1982 THE HOUSE BILL WAS PASSED IN LIEU OF THE SENATE BILLS AFTER AMENDING ITS LANGUAGE TO CONTAIN MUCH OF THE TEXT OF THE SENATE BILLS. THE SENATE REPORTS (THIS PAGE AND PAGE 2256) AND THE HOUSE CONFERENCE REPORT (PAGE 2261) ARE SET OUT.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL EACH

COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE CONFERENCE REPORT NO. 97-765
AUG. 19, 1982

* * * *

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

THE MANAGERS ON THE PART OF THE HOUSE AND THE SENATE AT THE CONFERENCE ON THE DISAGREEING VOTES OF THE TWO HOUSES ON THE AMENDMENTS OF THE SENATE TO THE BILL (H.R. 3239) TO AMEND THE COMMUNICATIONS ACT OF 1934 TO AUTHORIZE APPROPRIATIONS FOR THE ADMINISTRATION OF SUCH ACT, AND FOR. OTHER PURPOSES, SUBMIT THE FOLLOWING JOINT STATEMENT TO THE HOUSE AND THE SENATE IN EXPLANATION OF THE EFFECT OF THE ACTION AGREED UPON BY THE MANAGERS AND RECOMMENDED IN THE ACCOMPANYING CONFERENCE REPORT: THE SENATE AMENDMENT TO THE TEXT OF THE BILL STRUCK OUT ALL OF THE HOUSE BILL AFTER THE ENACTING CLAUSE AND INSERTED A SUBSTITUTE TEXT. THE HOUSE RECEDES FROM ITS DISAGREEMENT TO THE AMENDMENT OF THE SENATE WITH AN AMENDMENT WHICH IS A SUBSTITUTE FOR THE HOUSE BILL AND THE SENATE AMENDMENT. THE DIFFERENCES BETWEEN THE HOUSE BILL, THE SENATE AMENDMENT, AND THE SUBSTITUTE

AGREED TO IN CONFERENCE ARE NOTED BELOW, EXCEPT FOR CLERICAL CORRECTIONS, CONFORMING CHANGES MADE NECESSARY BY AGREEMENTS REACHED BY THE CONFERENCES, AND MINOR DRAFTING AND CLARIFYING CHANGES.

TITLE I

SHORT TITLE

HOUSE BILL

THE HOUSE BILL PROVIDED THAT THE BILL MAY BE CITED AS THE 'FEDERAL COMMUNICATIONS COMMISSION AUTHORIZATION ACT OF 1981 .'

SENATE AMENDMENT

THE SENATE AMENDMENT PROVIDED THAT THIS TITLE MAY BE CITED AS THE 'COMMUNICATIONS AMENDMENTS ACT OF 1982.'

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. WHILE THE COMMUNICATIONS ACT OF 1934 HAS BEEN AMENDED SEVERAL TIMES SINCE ITS INITIAL PASSAGE, IT HAS NEVER RECEIVED A THOROUGH TECHNICAL OVERHAUL AND CLEAN UP. THE ACT STILL CONTAINS NUMEROUS INSTANCES OF OBSOLETE LANGUAGE, WHILE IMPOSING REGULATORY REQUIREMENTS AND RESPONSIBILITIES UPON THE FCC WHICH ARE

AND RESPONSIBILITIES UPON THE FCC WHICH ARE NO LONGER NECESSARY IN LIGHT OF ADVANCEMENTS IN TECHNOLOGY AND CHANGED CIRCUMSTANCES. WHILE MANY OF THE PROVISIONS OF THE CONFERENCE SUBSTITUTE ARE MERELY TECHNICAL REVISIONS OF EXISTING LAW, SEVERAL PROVISIONS PERMIT THE FCC TO HAVE GREATER FLEXIBILITY IN REORGANIZING STAFF, IN CARRYING OUT ITS DUTIES, AND IN REDUCING THE AMOUNT OF UNNECESSARY PAPERWORK. MOST IMPORTANTLY, THE BILL PROVIDES A NUMBER OF BUDGET SAVING PROVISIONS WHICH WILL ENABLE THE COMMISSION MORE EFFICIENTLY AND EFFECTIVELY TO UTILIZE ITS MANPOWER AND RESOURCES AT A TIME OF BUDGETARY CONSTRAINT. FOR EXAMPLE, SECTION 307 OF THE COMMUNICATIONS ACT WOULD BE AMENDED BY AUTHORIZING THE COMMISSION TO ELIMINATE THE INDIVIDUAL LICENSING OF CITIZENS BAND (CB) AND RADIO CONTROL SERVICES, WHICH WOULD SAVE THE COMMISSION AT LEAST $400,000 ANNUALLY. OTHER PROVISIONS SUCH AS THOSE RELATING TO REIMBURSEMENT FOR TRAVEL, AWARDING LICENSES BY LOTTERY, INCREASING THE TERMS OF CERTAIN LICENSES, AND ELIMINATING THE NEED FOR CERTAIN CONSTRUCTION PERMITS WOULD ALSO RESULT IN SIGNIFICANT BUDGETARY AND RESOURCE SAVINGS. THREE MAJOR CLASSES OF LICENSES ARE DEALT WITH IN IN THE CONFERENCE SUBSTITUTE. AMATEUR RADIO, CITIZENS BAND (CB) RADIO, AND PRIVATE LAND MOBILE RADIO. IN ADDITION, THE ISSUES OF RADIO FREQUENCY INTERFERENCE

REJECTION STANDARDS AND COMMISSION AUTHORITY TO USE A SYSTEM OF RANDOM SELECTION TO GRANT LICENSES ARE ADDRESSED IN THE BILL. A DESCRIPTIVE BACKGROUND ON EACH ISSUE FOLLOWS. A. AMATEUR RADIO SERVICE.- THE AMATEUR RADIO SERVICE IS AS OLD AS RADIO ITSELF. EVERY SINGLE ONE OF THE EARLY RADIO PIONEERS, EXPERIMENTERS, AND INVENTORS WAS AN AMATEUR: COMMERCIAL, MILITARY, AND GOVERNMENT RADIO WAS UNKNOWN. THE ZEAL AND DEDICATION TO THE SERVICE OF MANKIND OF THOSE EARLY PIONEERS HAS PROVIDED THE SPIRITUAL FOUNDATION FOR AMATEUR RADIO OVER THE YEARS. THE CONTRIBUTIONS OF AMATEUR RADIO OPERATORS TO OUR PRESENT DAY COMMUNICATION TECHNIQUES, FACILITIES, AND EMERGENCY COMMUNICATIONS HAVE BEEN INVALUABLE. IN THE EARLY 1920S, AMATEURS WERE RELEGATED TO THE PORTION OF THE RADIO FREQUENCY SPECTRUM THAT WAS CONSIDERED AT THAT TIME TO BE VIRTUALLY USELESS: THE SHORT-WAVES BELOW 200 METERS. THESE SHORT-WAVES THAT ONCE WERE CONSIDERED USELESS ARE NOW OCCUPIED BY MARINE AND AVIATION, POLICE AND PUBLIC SAFETY, TELEVISION AND FM BROADCAST, INTERNATIONAL BROADCAST, AND AMATEUR SERVICES, TO NAME A FEW. AMATEURS ARE PIONEERING STILL TODAY. SPACE OR SATELLITE COMMUNICATIONS ARE A MOST IMPORTANT PART OF AMATEUR RADIO. THROUGH PROGRAM OSCAR (ORBITING SATELLITE CARRYING AMATEUR RADIO), AMATEURS HAVE BEEN UTILIZING

ADVANCED TECHNOLOGY FROM THEIR RELATIVELY SIMPLE, INEXPENSIVE GROUND STATIONS. SEVEN AMATEUR SATELLITES HAVE BEEN BUILT TO DATE BY AMATEURS AT THEIR EXPENSE. THE AMATEUR SPACE ACTIVITIES ARE PLAYING AN IMPORTANT ROLE IN ATTRACTING THE YOUNG PEOPLE OF AMERICA TO SCIENTIFIC FIELDS. ALMOST EVERY NATION HAS AMATEURS WHO COMMUNICATE EACH DAY WITH FELLOW AMATEURS IN OTHER COUNTRIES AND ON OTHER CONTINENTS PASSING VITAL EMERGENCY MESSAGE TRAFFIC AND ACTING AS AMBASSADORS OF INTERNATIONAL GOODWILL. THE MODES OF COMMUNICATION INCLUDE MORSE CODE TELEGRAPHY, TELEPHONE, TELETYPE OR TELEPRINTER, TELEVISION AND FACSIMILE. EQUIPMENT RANGES FROM HOME-BUILT TRANSMITTERS AND RECEIVERS USING PARTS FROM DISCARDED RADIO AND TELEVISION RECEIVERS AND COSTING ONLY A FEW DOLLARS, TO THE MOST SOPHISTICATED EQUIPMENT MANUFACTURED FOR COMMERCIAL, GOVERNMENT, AND MILITARY USE COSTING MANY HUNDREDS OF DOLLARS. THERE ARE APPROXIMATELY 400,000 AMATEURS IN THE UNITED STATES AND ALMOST 900,000 THROUGHOUT THE WORLD. AT ANY TIME OF EVERY DAY, THOUSANDS OF AMATEURS SCATTERED THROUGHOUT THE WORLD ARE LISTENING TO AND COMMUNICATING WITH FELLOW AMATEURS OVER DISTANCES VARYING FROM ONLY A FEW MILES WITHIN A CITY TO THOUSANDS OF MILES ACROSS THE WORLD. IT IS

THE LARGE NUMBER OF AMATEURS DISPERSED AROUND THE WORLD OPERATING IN THE FIVE HIGH FREQUENCY BANDS THAT HAS MADE IT POSSIBLE TO PROVIDE THE FIRST, AND FOR SOME TIME THEREAFTER DISASTERS, EARTHQUAKES, TIDAL WAVES, HURRICANES, TORNADOES, BLIZZARDS AND FLOODS, AND THE OUTSIDE WORLD. EVERY AMATEUR HAS EARNED HIS LICENSE BY HAVING DEMONSTRATED HIS KNOWLEDGE OF RADIO THEORY AND APPLICATION, INTERNATIONAL MORSE CODE, THE COMMUNICATIONS ACT, AND THE REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION. ENTRY INTO AMATEUR RADIO USUALLY IS THROUGH THE NOVICE CLASS. AMATEURS ARE ENCOURAGED TO INCREASE THEIR. KNOWLEDGE AND SKILLS BY A SERIES OF FIVE CLASSES OR GRADES OF LICENSE, ALL BUT ONE WITH LIMITED OPERATING PRIVILEGES. THE AMATEUR RADIO SERVICE HAS BEEN PRAISED FOR BEING SELF-REGULATED. THE COMMISSION HAS REPORTED THAT LESS TIME HAS BEEN DEVOTED TO MONITORING AND REGULATING THE AMATEUR SERVICE THAN TO ANY OTHER SERVICE BECAUSE OF ITS SELF- POLICING AND DISCIPLINE. ONE PRIMARY PURPOSE OF THE CONFERENCE SUBSTITUTE IS TO PROVIDE THE FEDERAL COMMUNICATIONS COMMISSION WITH THE AUTHORITY TO IMPLEMENT VARIOUS PROGRAMS WHICH WILL RESULT IN IMPROVEMENTS IN ADMINISTRATION OF THE AMATEUR RADIO SERVICE AND TO CUT THE COST THEREOF. IT WILL FURTHER ALLOW THE AMATEUR RADIO SERVICE

TO CONTINUE ITS TRADITION AS THE MOST SELF-REGULATED RADIO SERVICE IN THE UNITED STATES, AND TO BECOME TO SOME EXTENT SELF-ADMINISTERED, REQUIRING EVEN LESS EXPENDITURE TO GOVERNMENT TIME AND EFFORT THAN IN THE PAST. B. CITIZENS BAND RADIO SERVICE.- THE CITIZENS BAND (CB) RADIO SERVICE COMPRISES THE LARGEST SINGLE CLASS OF RADIO OPERATORS IN THE COUNTY. ALTHOUGH THE CB FAD THE NATION EXPERIENCED DURING THE LATE 1970S MAY NOW BE OVER, THERE ARE STILL MILLIONS OF CB LICENSEES THROUGHOUT THE UNITED STATES. CITIZENS BAND RADIO IS THE PRIMARY HIGHWAY COMMUNICATIONS SYSTEM FOR INDIVIDUALS IN THE UNITED STATES. IT IS THE ONLY TWO-WAY SERVICE AVAILABLE TO CONDUCT PERSONAL AND/OR BUSINESS COMMUNICATIONS BETWEEN PRIVATE CITIZENS, BUSINESSES, POLICE AND GOVERNMENT OFFICIALS. CHANNEL 9 ON THE CITIZENS BAND HAS BEEN DESIGNATED AS AN OFFICIAL EMERGENCY TRAVELER'S ASSISTANCE CHANNEL. THIS HAS BEEN RECOGNIZED BY USERS AND MANUFACTURERS ALIKE, RESULTING IN THE PURCHASE OF CB RADIOS AS A HIGHWAY SAFETY DEVICE TO BE USED IN FAMILY AUTOMOBILES AND OTHER VEHICLES. THE U.S. COAST GUARD MONITORS CHANNEL 9 TO HEAR BOATING EMERGENCIES. MOREOVER, MANY FLEETS OF STATE HIGHWAY PATROL AND STATE AND LOCAL POLICE VEHICLES HAVE BEEN EQUIPPED WITH CB RADIO TO ASSIST MOTORISTS. IN ADDITION TO THE SPECIAL CHANNEL 9 FUNCTION, CB RADIO HAS OFTEN BEEN USED BY INDIVIDUALS AND

AUTHORITIES OF EMERGENCIES AND NATURAL DISASTERS. IN MANY CASES, A CB RADIO OPERATOR ON THE SCENE HAS COMMUNICATED THE FIRST NEWS OF AIRPLANE CRASHES, FLOODS, EARTHQUAKES, TORNADOES, AND OTHER CATASTROPHES. MOREOVER, MANY CB ORGANIZATIONS HAVE WORKED WITH LOCAL LAW ENFORCEMENT AGENCIES TO ESTABLISH ON-GOING PROGRAMS WHEREBY CBERS VOLUNTARILY PERFORM FUNCTIONS SUCH AS MOTORIST ASSISTANCE, SECURITY PATROL OBSERVATION, AREA SEARCHES FOR MISSING PERSONS, ESCORTS FOR OVERSIZED VEHICLES OR PARADES, DISASTER DUTY, OR FACILITATION OF RESCUE MISSIONS. THE COMMUNITY SERVICE PROVIDED BY THE CB RADIO SERVICE AND ITS MANY ORGANIZATIONS HAS BEEN RECOGNIZED ON NUMEROUS OCCASIONS. FOR EXAMPLE, IN 1978, THE HEADS OF THE THREE FEDERAL GOVERNMENT AGENCIES (DEPARTMENT OF TRANSPORTATION, INTERSTATE COMMERCE COMMISSION, AND FEDERAL COMMUNICATIONS COMMISSION) SIGNED A FEDERAL POLICY STATEMENT ON THE BENEFITS OF CB RADIO FOR THE PROMOTION OF HIGHWAY SAFETY. THE AMERICAN NATIONAL RED CROSS HAS OFFICIALLY RECOGNIZED THE EFFECTIVENESS OF CB RADIO IN DISASTER SITUATIONS AND HAS AGREED TO WORK WITH CB GROUPS FOR THE PURPOSE OF DISASTER RELIEF. ONE CB ORGANIZATION IN PARTICULAR, REACT INTERNATIONAL, RECEIVED THE 1982 PRESIDENT'S VOLUNTEER ACTION AWARD IN RECOGNITION OF THE OUTSTANDING PUBLIC SERVICE

PERFORMANCE OF ITS VOLUNTEER MEMBERS IN MONITORING CHANNEL 9 AND PROVIDING OTHER ASSISTANCE TO PROMOTE HIGHWAY SAFETY. THESE PUBLIC SERVICE VOLUNTARY EFFORTS BY CB OPERATORS HAVE BEEN THREATENED BY A SMALL MINORITY OF CB USERS WHO, EITHER MALICIOUSLY OR IN IGNORANCE OF FCC RULES, TRANSMIT REGULARLY NON-EMERGENCY COMMUNICATIONS ON THE OFFICIAL EMERGENCY AND TRAVELER'S ASSISTANCE CHANNEL. ONE KEY PURPOSE OF THE CONFERENCE SUBSTITUTE IS TO PERMIT THE FCC TO ACCEPT THE VOLUNTEER SERVICES OF CB OPERATORS TO MONITOR THE CB FREQUENCIES FOR SUCH RULE VIOLATIONS IN ORDER TO PRESERVE THE INTEGRITY OF THE CB SERVICE. MOREOVER, THE CONFEREES ARE EXTREMELY CONCERNED THAT SHOULD THE COMMISSION DECIDE TO DE-LICENSE THE CB SERVICE, THE COMMISSION CONTINUES TO ENSURE THAT THE OVERALL INTEGRITY OF THIS SERVICE IS PROTECTED. C. PRIVATE LAND MOBILE SERVICE.- LICENSEES IN THE PRIVATE LAND MOBILE SERVICES INCLUDE PUBLIC SAFETY, INDUSTRIAL, BUSINESS AND LAND TRANSPORTATION USERS WHICH OPERATE THEIR OWN PRIVATE ONE-WAY AND TWO-WAY LAND MOBILE SYSTEMS, MOST OFTEN AS MEANS OF ENHANCING A FIRM'S ABILITY OF PROVIDING A MULTITUDE OF OTHER GOODS OR SERVICES TO THE AMERICAN PUBLIC. PRIVATE LAND MOBILE SERVICES PLAY A RELATIVELY UNKNOWN, BUT CRITICALLY IMPORTANT, ROLE IN PROTECTING THE PUBLIC WELFARE AND IN PROMOTING ECONOMIC VITALITY. BECAUSE OF

THE EXISTENCE OF PRIVATE LAND MOBILE RADIO, A LARGE NUMBER OF BUSINESS ESTABLISHMENTS, LARGE AND SMALL, ARE CAPABLE OF RESPONDING QUICKLY TO SERVICE CALLS FROM HOMEOWNERS AND CONSUMERS, ENABLING THEM TO BE MORE EFFICIENT AND ECONOMICAL. POLICE, FIRE, AMBULANCE, AND OTHER EMERGENCY SERVICES TO THE PUBLIC ARE IN LARGE PART RELIANT ON THE USE OF PRIVATE LAND MOBILE RADIO. IN ADDITION, PRIVATE LAND MOBILE RADIO IS RAPIDLY BECOMING AN IMPORTANT TOOL FOR THE SURVIVAL OF THE SMALL BUSINESSMAN IN THE PRESENT ECONOMY. ADDITIONALLY, PUBLIC UTILITIES ARE ABLE TO RESPOND QUICKLY TO CALLS, AVOID WIDESPREAD DISRUPTION OF UTILITY SERVICE TO THE GENERAL PUBLIC, AND PROMPTLY RESTORE SERVICE DURING BLACKOUTS THROUGH USE OF SUCH RADIO SERVICE. MOREOVER, MANUFACTURING PLANTS AND REFINERIES ARE ABLE TO OPERATE IN A MORE EFFICIENT AND SAFE MANNER; FOREST CREWS ARE ABLE TO CONTAIN FOREST FIRES WITH LESS PERSONAL DANGER AND WITH LESS LOSS OF VALUABLE TIMBER, AND, SNOWPLOWS AND OTHER HIGHWAY EQUIPMENT CAN BE UTILIZED MORE EFFECTIVELY AND CONSTRUCTION ACTIVITIES CAN BE BETTER COORDINATED. THESE ARE ONLY A FEW OF THE MANY IMPORTANT AND ESSENTIAL USES OF PRIVATE LAND MOBILE RADIO AFFECTING PUBLIC SAFETY AND THE WELFARE, AS WELL AS THE ECONOMY. THE CONFERENCE SUBSTITUTE RECOGNIZES THE CRITICAL IMPORTANCE OF THE PRIVATE LAND MOBILE SERVICES AND PROVIDES

STATUTORY SUPPORT AND GUIDANCE FOR EXISTING AND FUTURE FCC REGULATION OF THESE SERVICES. D. RADIO FREQUENCY INTERFERENCE REJECTION STANDARDS.-- RADIO FREQUENCY INTERFERENCE (RFI) ARISES WHEN A SIGNAL RADIATION BY A TRANSMITTER IS PICKED UP BY AN ELECTRONIC DEVICE IN SUCH A MANNER THAT IT PREVENTS THE CLEAR RECEPTION OF ANOTHER AND DESIRED SIGNAL OR CAUSES MALFUNCTION OF SOME OTHER ELECTRONIC DEVICE (NOT SIMPLY A RADIO OR TELEVISION RECEIVER). WHILE ALMOST ANY TRANSMITTER OF ANY SERVICE IS A POTENTIAL INTERFERENCE SOURCE, AMATEUR OR CITIZENS BAND (CB) STATIONS ARE VERY OFTEN ASSOCIATED WITH RFI PROBLEMS INVOLVING ELECTRONIC DEVICES IN THE HOME. PARTICULARLY SINCE THE ADVENT OF COMMERCIAL TELEVISION IMMEDIATELY FOLLOWING WORLD WAR II, AMATEUR RADIO OPERATORS HAVE BEEN ACTIVE IN INTERFERENCE CONTROL AND ELIMINATION. THE AMATEURS LEARNED VERY EARLY THAT THE INCORPORATION OF GOOD ENGINEERING PRACTICES IN THEIR TRANSMITTER CONSTRUCTION, SUCH AS ELECTROSTATIC SHIELDING AND FILTERING, MINIMIZED THE POSSIBILITY OF INTERFERENCE BY PREVENTING THE RADIATION OF SPURIOUS SIGNALS. SUCH PRACTICES AND TECHNIQUES ARE WELL UNDERSTOOD AND ARE UNIVERSALLY INCORPORATED IN TRANSMITTERS MANUFACTURED AND IN USE TODAY, IRRESPECTIVE OF THE SERVICE. APPROPRIATE RULES OF THE FEDERAL COMMUNICATIONS

COMMISSION REQUIRE ALL TRANSMITTERS OF ALL SERVICES, INCLUDING THE TRANSMITTING SECTIONS OF TRANSCEIVERS, TO SUPPRESS SPURIOUS RADIATION. IT HAS BECOME EVIDENT THAT MANY INTERFERENCE PROBLEMS INVOLVING HOME ELECTRONIC EQUIPMENT AND SYSTEMS ARE NOT FULLY RESOLVABLE BUT THAT RESOLUTION OF SOME INTERFERENCE PROBLEMS MAY REQUIRE ACTION WITH RESPECT TO RECEIVERS AND OTHER ELECTRONIC DEVICES PICKING UP UNWANTED SIGNALS. CAUSES FOR INTERFERENCE TO TELEVISION RECEPTION, FOR EXAMPLE, CAN BE DIVIDED INTO THE FOLLOWING CATEGORIES. FIRST, ALTHOUGH LEAST COMMON, IS THE PICKUP OF A SPURIOUS (UNWANTED) SIGNAL HAVING A FREQUENCY WITHIN OR CLOSE TO THE BAND OF FREQUENCIES OCCUPIED BY THE TELEVISION SIGNAL. SUCH INTERFERENCE USUALLY IS CAUSED BY AN INTERFERING TRANSMITTER. IN MANY INSTANCES, THERE IS WHAT IS TERMED THE TELEVISION CHANNEL. THAT IS PARTICULARLY THE CASE WITH THE 27 MEGAHERTZ CB SERVICE: THE SECOND AND THIRD HARMONICS (MULTIPLES) OF THE 27 MEGAHERTZ CB' SIGNAL FALL IN TV CHANNELS 2 AND 5, RESPECTIVELY. IT IS GENERALLY RECOGNIZED THAT NO TV DESIGN CAN ELIMINATE SUSCEPTIBILITY TO HARMONIC INTERFERENCE. SECOND IS THE OVERLOADING OF THE INPUT CIRCUIT OF THE TELEVISION RECEIVER BY AN UNDESIRED SIGNAL SO STRONG THAT OVERLOADING, I.E. MALFUNCTIONING, OF THE CIRCUITS GENERATES SPURIOUS SIGNALS WITHIN THE TELEVISION RECEIVER THAT INTERFERES

WITH THE DESIRED SIGNAL. SUCH INTERFERENCE USUALLY IS MORE SEVERE WITH TRANSISTORIZED RECEIVERS AND MAY RESULT FROM POOR CIRCUIT DESIGN IN THE RECEIVER. THIRD IS THE PICKUP OF AN UNDESIRED SIGNAL BY CIRCUITS WITHIN THE SET OR WIRING LEADING TO THE SET. POOR SHIELDING OR POOR CIRCUIT DESIGN IN THE RECEIVER IS USUALLY THE CULPRIT. INTERFERENCE TO OTHER ELECTRONIC DEVICES SUCH AS RECORD PLAYERS, HI-FI AMPLIFIERS, HOME BURGLAR ALARM AND SECURITY SYSTEMS, AUTOMATIC GARAGE DOOR OPENERS, ELECTRONIC ORGANS, AND PUBLIC ADDRESS SYSTEMS USUALLY ARISES FROM THE PICK-UP OF A RELATIVELY STRONG SIGNAL BY THE EXTERNAL WIRING, SUCH AS THE WIRES LEADING TO THE SPEAKERS OR TO THE POWER SOURCE, FOLLOWED BY THE RECTIFICATION OF THE SIGNAL BY A CIRCUIT, CONTACT OR COMPONENT WITHIN THE DEVICE. THE CURES FOR MOST SUCH INTERFERENCE HAVE BEEN WELL KNOWN FOR MANY YEARS. OFTEN AN INEXPENSIVE FILTER IN THE LEAD FROM THE ANTENNA TO THE TELEVISION RECEIVER WILL REDUCE THE INTERFERENCE TO AN ACCEPTABLE LEVEL OR ELIMINATE IT ENTIRELY. FOR THE OTHER ELECTRONIC DEVICES, THE JUDICIOUS INSTALLATION OF INEXPENSIVE CAPACITORS (DEVICES WHICH PREVENT WIRING FROM PICKING UP UNDESIRED SIGNALS) MAY SUFFICE. EVEN THOUGH THE CAUSES AND CURES OF RADIO AND TELEVISION INTERFERENCE HAVE BEEN KNOWN FOR MANY YEARS, THE NUMBER OF COMPLAINTS RECEIVED BY THE COMMISSION HAS GROWN

STEADILY EACH YEAR. WITH THE RAPID, AND INDEED EXPLOSIVE, GROWTH OF THE 27 MHZ CB SERVICE IN THE MID-1970S, THE PROBABILITY OF A HOME ELECTRONIC DEVICE BEING LOCATED NEAR A TRANSMITTER OF SOME SORT HAS INCREASED SUBSTANTIALLY. THE PUBLIC'S USE OF HOME ELECTRONIC DEVICES HAS GROWN, AND CONTINUES TO GROW, AT AN EXPONENTIAL RATE. MANY MANUFACTURERS OF HOME ELECTRONIC EQUIPMENT AND SYSTEMS HAVE BEEN WILLING TO PROVIDE, OFTEN-FREE OF CHARGE, FILTERS FOR ELECTRONIC EQUIPMENT WHEN A PARTICULAR INTERFERENCE PROBLEM IS BROUGHT TO THEIR ATTENTION. HOWEVER, THEIR EFFORTS TO VOLUNTARILY ADDRESS THE ROOT PROBLEM BY INCORPORATING SUCH RFI SUPPRESSION TECHNIQUES IN THE DESIGN AND ASSEMBLY-LINE STATE HAVE BEEN LESS THAN ADEQUATE. THIS IS TRUE EVEN THOUGH SUCH FILTERING MECHANISMS AND ANTI- INTERFERENCE DESIGN MAY ONLY COST A FEW CENTS PER UNIT. MANY BELIEVE THAT THE COMMISSION DOES NOT NOW HAVE AUTHORITY TO COMPEL THE USE OF PROTECTIVE DEVICES IN EQUIPMENT WHICH DOES NOT EMIT RADIO FREQUENCY ENERGY SUFFICIENT IN DEGREE TO CAUSE HARMFUL INTERFERENCE TO RADIO COMMUNICATIONS. MANUFACTURERS AND RETAILERS ALSO BELIEVE THAT THE COMMISSION CANNOT REQUIRE A LABEL ON EQUIPMENT OR THE SUPPLYING OF A PAMPHLET OF THE POSSIBILITY OF INTERFERENCE AND OUTLINING CORRECTIVE MEASURES. THE COMMISSION HAS THUS FAR ACTED IN CONSONANCE WITH THIS BELIEF. THE

IN CONSONANCE WITH THIS BELIEF. THE CONFERENCE SUBSTITUTE WOULD THUS GIVE THE FCC THE AUTHORITY TO REQUIRE THAT HOME ELECTRONIC EQUIPMENT AND SYSTEMS BE SO DESIGNED AND CONSTRUCTED AS TO MEET MINIMUM STANDARDS FOR PROTECTION AGAINST UNWANTED RADIO SIGNALS AND ENERGY. EXTENSIVE AMATEUR AND COMMISSION EXPERIENCE OVER THE YEARS WITH INTERFERENCE INVESTIGATION AND ELIMINATION SUPPORTS THE CONCLUSION THAT, IN MOST INSTANCES, SATISFACTORY CORRECTIVE MEASURES CAN BE SIMPLE AND INEXPENSIVE. THE CONFEREES BY NO MEANS INTENDS FOR MAJOR MODIFICATIONS AND REDESIGNS OF EQUIPMENT TO BE REQUIRED, OR THAT THE COMMISSION REQUIRE STEPS TO BE TAKEN WHICH IMPOSE SUBSTANTIAL ADDITIONAL COSTS OR UNNECESSARY BURDENS ON EQUIPMENT MANUFACTURERS. WE DO NOT BELIEVE THAT ELABORATE PROCEDURES WILL BE NECESSARY IN ORDER TO ACHIEVE THE DESIRED RESULT. EXISTING EQUIPMENT AND THAT MANUFACTURED PRIOR TO THE DATE OF ENACTMENT OF THIS LEGISLATION WILL BE EXEMPT FROM ANY SUCH STANDARDS AS MIGHT BE ESTABLISHED BY THE FCC. THE MILLIONS OF PURCHASERS OF TELEVISION AND RADIO RECEIVERS AND OTHER HOME ELECTRONIC EQUIPMENT AND SYSTEMS EACH YEAR DESERVE PROTECTION FROM INTERFERENCE. SIGNIFICANT REDUCTION OF INTERFERENCE FROM THE MULTITUDE OF COMPLAINTS RECEIVED EACH YEAR BY THE

OF THIS PROVISION, AS SHOULD LAWSUITS AGAINST AMATEUR AND OTHER RADIO OPERATORS IN LOCAL JURISDICTIONS BASED UPON INTERFERENCE. SECTION 7 OF THE CONFERENCE SUBSTITUTE IS VIEWED BY THE CONFEREES AS NECESSARY TO ADDRESS ADEQUATELY THIS INCREASING PROBLEM, WHICH PLAGUES SO MANY OF THE NATION'S CONSUMERS. MOREOVER, BY VIRTUE OF THIS SECTION, THE CONFEREES WISHES TO CLARIFY THAT THE EXCLUSIVE JURISDICTION OVER RFI INCIDENTS (INCLUDING PREEMPTION OF STATE AND LOCAL REGULATION OF SUCH PHENOMENA) LIES WITH THE FCC. E. FCC AUTHORITY TO USE A SYSTEM OF RANDOM SELECTION.-- ON AUGUST 13, 1981, PRESIDENT REAGAN SIGNED INTO LAW THE OMNIBUS BUDGET RECONCILIATION ACT OF 1981, PUB.L. NO. 97-35, 95 STAT. 357 (1981). SECTION 1242(A) OF THIS ACT ADDED A NEW SUB SECTION 309(I) TO THE COMMUNICATIONS ACT OF 1934 (47 U.S.C. 309(I)) AUTHORIZING THE FCC TO GRANT LICENSEES ON THE BASIS OF RANDOM SELECTION OR LOTTERY. 95 STAT. 736 (1951). THIS STATUTE PERMITTED THE COMMISSION TO GRANT LICENSEES OR CONSTRUCTION PERMITS INVOLVING ANY USE OF THE ELECTROMAGNETIC SPECTRUM TO A QUALIFIED APPLICANT THROUGH THE USE OF A LOTTERY SYSTEM. THE STATUTE GAVE THE COMMISSION THE DISCRETION TO DETERMINE WHEN THE USE OF A LOTTERY TO GRANT LICENSES OK PERMITS WAS APPROPRIATE. ANY USE OF A LOTTERY SYSTEM BY THE COMMISSION, HOWEVER, WAS REQUIRED TO INCORPORATE 'SIGNIFICANT

PREFERENCES' TO 'GROUPS OK ORGANIZATIONS, OR MEMBERS OF GROUPS OK ORGANIZATIONS, WHICH ARE UNDER- REPRESENTED IN THE OWNERSHIP OF TELECOMMUNICATIONS FACILITIES OR PROPERTIES.' 47 U.S.C: 309 (I)(3)(A). THE INTENT OF THE CONGRESS IN REQUIRING SUCH SIGNIFICANT PREFERENCES IN THE ADMINISTRATION OF A LOTTERY WAS TO INCREASE THE NUMBER OF MEDIA OUTLETS OWNED BY SUCH UNDER-REPRESENTED PERSONS OR GROUPS, THEREBY FOSTERING DIVERSITY OF OWNERSHIP IN THE MEDIA OF MASS COMMUNICATIONS. CONFERENCE REPORT ON H.R. 3982. OMNIBUS BUDGET RECONCILIATION ACT OF 1981- BOOK 2, H.R. REP. NO. 97-208, 97TH CONG., 1ST SESS. 897 (1981). BECAUSE OF CONGRESSIONAL DESIRE THAT THE FCC PROCEED EXPEDITIOUSLY TO IMPLEMENT A LOTTERY SCHEME, THE STATUTE DIRECTED THE COMMISSION TO ESTABLISH RULES FOR A SYSTEM OF RANDOM SELECTION, NOT LATER THAN 180 DAYS AFTER THE EFFECTIVE DATE' OF THE ACT. 47 U.S.C. 309(I)(4)(A). THE 180 DAY PERIOD EXPIRED ON FEBRUARY 9, 1982. ON FEBRUARY 8, 1982, THE COMMISSION HELD A PUBLIC MEETING TO ANNOUNCE THAT IT WOULD 'DECLINE' TO ADOPT RULES GOVERNING A LOTTERY SYSTEM, STATING THAT IT FOUND THE REQUIREMENTS OF THE STATUTE TO BE AMBIGUOUS AND UNWORKABLE. RANDOM SELECTION OR LOTTERIES, REPORT AND ORDER, FCC GENERAL DOCKET NO. 81-768 (1982). THE COMMISSION STATED THAT 1T DID NOT BELIEVE THAT CONGRESS WOULD INTEND FOR (IT) TO

EXPEND (ITS) LIMITED RESOURCES TO DRAFT AND DEFEND RULES CREATING A LOTTERY FRAMEWORK WHICH WOULD NOT BE USED.' RANDOM SELECTION OR LOTTERIES, REPORT AND ORDER, FCC GENERAL DOCKET NO. 81-768, FOOTNOTE AT PAGE 28 (1982). WHILE THE COMMISSION CITED LEGAL AND ADMINISTRATIVE DIFFICULTIES WITH THE STATUTE, IT DID NOT SEEK ANY TYPE OF FORMAL DIRECTION OR CLARIFICATION FROM THE CONGRESS PRIOR TO THE EXPIRATION OF THE 180 DAY PERIOD AS TO HOW A LOTTERY SYSTEM MIGHT BE DESIGNED. IT WAS ONLY AFTER CERTAIN MEMBERS OF THE CONGRESS EXPRESSED THEIR VIEW THAT THE COMMISSIONS ABDICATION OF ITS STATUTORY RESPONSIBILITY MUST BE RECTIFIED, THAT THE COMMISSION SOUGHT ADDITIONAL GUIDANCE FROM THE CONGRESS. THE CONFEREES CONSIDERED THIS ACTION TO BE IN CLEAR VIOLATION OF THE PLAIN LANGUAGE OF THE STATUTE, WHICH MANDATED THAT THE COMMISSION PRESCRIBE LOTTERY RULES WITHIN 180 DAYS, WHILE PERMITTING THE AGENCY DISCRETION ONLY WITH RESPECT TO WHEN A LOTTERY WOULD ACTUALLY BE USED. IT WAS FELT THAT AS A CREATURE OF CONGRESS, THE COMMISSION MUST OBEY THE DIRECTIVES OF ITS CREATOR, AND THAT IT IS NOT FOR THE FCC TO PRESUME LEGISLATIVE INTENT WHEN CONGRESS CLEARLY MANDATED THAT AN ACTION BE TAKEN, OR TO REFUSE TO TAKE ACTION BECAUSE IT FELT THAT CONGRESS HAD NOT PASSED THE PRECISE LOTTERY STATUTE IT WANTED. SEVERAL

MEMBERS CONSIDERED THIS TO BE A VIOLATION OF FEDERAL LAW WHICH TOTALLY THWARTED CONGRESSIONAL INTENT THAT GENERIC LOTTERY RULES BE ESTABLISHED AND AVAILABLE FOR USE AS SOON AS POSSIBLE. THIS WAS SO THAT IF AT ANY TIME THE PRESENT OR SOME FUTURE COMMISSION WISHED TO UTILIZE A LOTTERY PROCESS, THE RULES WOULD ALREADY BE IN PLACE AND THERE WOULD BE NO DELAYS BROUGHT ABOUT BY HAVING TO THEN TAKE THE TIME TO DEVELOP A GENERIC LOTTERY PROCESS. THE AMENDMENTS TO THE LOTTERY STATUTE IN THE CONFERENCE SUBSTITUTE AND THE LEGISLATIVE HISTORY CONTAINED IN THE DETAILED SECTION-BY-SECTION ANALYSIS WHICH FOLLOWS ARE INTENDED TO GIVE THE COMMISSION THE ADDITIONAL GUIDANCE AND CLARIFICATION IT SAID IT NEEDED TO ESTABLISH LOTTERY RULES. THE AMENDMENTS RETAIN THE PRINCIPLES WHICH WERE AGREED UPON BY BOTH THE HOUSE AND SENATE DURING THE BUDGET RECONCILIATION PROCESS.

FINANCIAL INTERESTS OF MEMBERS AND EMPLOYEES OF FEDERAL COMMISSION

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE AMENDMENT SECTION 4(B) OF THE COMMUNICATIONS ACT OF 1934 BY REPLACING THE ABSOLUTE BAR ON THE OWNERSHIP OF ANY INTEREST IN ANY COMPANY INVOLVED IN WIRE OR RADIO COMMUNICATIONS OR IN THE MANUFACTURE OR SALE OF WIRE OR RADIO EQUIPMENT WITH A STANDARD THAT PROHIBITS OWNERSHIP ONLY WHEN THERE EXISTS A 'SIGNIFICANT INTEREST' IN COMMUNICATIONS, MANUFACTURING, OR SALES ACTIVITIES WHICH ARE SUBJECT TO REGULATION BY THE COMMISSION, AND SETS FORTH REASONABLE GUIDELINES AS TO WHEN THE STANDARD IS MET.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION, WITH ONE CHANGE. SECTION 4(B)(5) OF THE ACT, DRAFTED WHEN THE FCC HAD SEVEN MEMBERS, HAS BEEN AMENDED IN THE CONFERENCE SUBSTITUTE TO ESTABLISH A FORMULA FOR POLITICAL BALANCE IN COMMISSION MEMBERSHIP, REGARDLESS OF THE SIZE OF THE COMMISSION. THE STATUTORY RESTRICTION IMPOSING AN ABSOLUTE BAR ON OWNERSHIP INTERESTS, ADDRESSED BY THE SENATE AMENDMENT, HAS PROVEN TO BE A HARDSHIP, PARTICULARLY FOR STAFF EMPLOYEES WHO MAY HAVE MINOR SECURITIES HOLDINGS IN FIRMS WHICH DEAL ONLY PERIPHERALLY WITH 'WIRE OR RADIO COMMUNICATIONS.' FOR

EXAMPLE, A COMMISSION EMPLOYEE WORKING IN THE COMMON CARRIER BUREAU IS FORBIDDEN FROM OWNING EVEN ONE SHARE OF STOCK IN A BUS COMPANY WHICH INCIDENTALLY MIGHT OWN AND OPERATE RADIOS ON ITS TRANSPORTATION VEHICLES. AS THE COMMISSION HAS OBSERVED IN ADDRESSING THIS PROHIBITION, IN THE TELECOMMUNICATIONS AGE THERE IS SCARCELY A MAJOR ENTERPRISE WHICH IS NOT IN SOME WAY CONNECTED WITH A TELECOMMUNICATIONS PRODUCT OR SERVICE. EMPLOYEE FINANCIAL INTERESTS, NOTICE OF PROPOSED RULEMAKING, 45 FED.REG. 47885 (JULY 17, 1980). FOR EXAMPLE, RADIO COMMUNICATIONS ARE USED AND COMMISSION LICENSES ARE HELD BY BUSINESSES SUCH AS AIRLINES, RAILROADS, MARITIME VESSELS, TAXICABS, AND NUMEROUS OTHER INDUSTRIES. ADDITIONALLY, VIRTUALLY EVERY LARGE RETAIL ESTABLISHMENT SELLS EQUIPMENT REGULATED BY THE COMMISSION (E.G., RADIOS, TELEVISION, MICROWAVE OVENS). THE LANGUAGE AMENDING SECTION 4(B)(2) OF THE COMMUNICATIONS ACT SPECIFIES A TWO-FOLD REQUIREMENT THAT MUST BE MET BEFORE THE PROHIBITION WOULD BE APPLICABLE: (1) THE INTEREST OR ACTIVITY MUST FALL WITHIN THE PARAMETERS OF AT LEAST ONE OF FOUR SPECIFIED CATEGORIES INVOLVING SIGNIFICANT REGULATION SET OUT IN THE LEGISLATION; AND (2) THE ENTITY INVOLVED MUST HAVE A SIGNIFICANT INTEREST IN ACTIVITIES OWNERSHIP PROHIBITIONS BE READ SEPARATELY. FOR EXAMPLE, A COMPANY THAT HAS CERTAIN

OPERATIONS WHICH ARE 'SIGNIFICANTLY REGULATED' BY THE COMMISSION WOULD NOT NECESSARILY HAVE A 'SIGNIFICANT INTEREST' IN ACTIVITIES SUBJECT TO COMMISSION REGULATION. THE CONFEREES BELIEVE THAT THIS PROVISION WILL ADD INTEGRITY TO THE REGULATORY PROCESS BY ASSURING THAT MEMBERS AND EMPLOYEES OF THE AGENCY WILL NOT HAVE CONFLICTS OF INTEREST OF ANY MEANINGFUL CONSEQUENCE, WHILE AT THE SAME TIME NOT PRECLUDING FINANCIAL INTERESTS IN MATTERS THAT ARE ONLY REMOTELY RELATED TO THE AGENCY'S ACTIVITIES. IN ADDITION, THE PROVISION WOULD PERMIT THE COMMISSION TO WAIVE THE CONFLICT OF INTEREST PROHIBITIONS FOR COMMISSION EMPLOYEES (BUT NOT COMMISSIONERS) IF THE COMMISSION DETERMINES THAT THE FINANCIAL INTERESTS OF THE INVOLVED EMPLOYEE ARE MINIMAL. THIS WAIVER AUTHORITY IS SUBJECT TO 18 U.S.C. 208, WHICH ESSENTIALLY PROHIBITS AN EMPLOYEE FROM PARTICIPATING IN ANY MATTER IN WHICH THE EMPLOYEE HAS A FINANCIAL INTEREST (SUBJECT TO ANOTHER WAIVER PROVISION WHERE THE INTEREST IS SO INSUBSTANTIAL AS TO BE DEEMED UNLIKELY TO AFFECT THE INTEGRITY OF THE EMPLOYEE'S SERVICES). ANY EXERCISE OF THIS WAIVER AUTHORITY MUST BE ACCOMPANIED BY PUBLICATION OF SUCH ACTION IN THE FEDERAL REGISTER AND NOTIFICATION OF BOTH THE HOUSE AND SENATE AUTHORIZATION COMMITTEES IN ORDER TO RETAIN CONGRESSIONAL OVERSIGHT AND PUBLIC CONFIDENCE IN THE COMMISSION'S

REGULATORY RESPONSIBILITIES. THE CONFEREES INTEND THAT THE COMMISSION EXERCISE THIS WAIVER AUTHORITY WITH THE UTMOST CARE AND PROPRIETY. THE CONFEREES NOTE THAT THE AMENDMENT TO SECTION 4(B) ALSO DELETES A SENTENCE WHICH PROHIBITS ANY COMMISSIONER WHO HAS NOT SERVED HIS FULL TERM FROM REPRESENTING ANY PERSON BEFORE THE COMMISSION IN A PROFESSIONAL CAPACITY FOR ONE YEAR FOLLOWING THE TERMINATION OF HIS SERVICE. THE COMMITTEE WISHES TO EMPHASIZE THAT THE PURPOSE OF THIS DELETION IS ONLY TO MAKE THE COMMUNICATIONS ACT CONSISTENT WITH THE CONFLICT OF INTEREST RULES WHICH GOVERN ALL FEDERAL OFFICIALS, THE ETHICS IN GOVERNMENT ACT, AS AMENDED 18 U.S.C. 207 (1978). THE COMMITTEE NOTES THAT THE PROHIBITIONS IN THE ETHICS IN GOVERNMENT ACT ARE STRONGER THAN THOSE PRESENTLY IN SECTION 4(B) OF THE COMMUNICATIONS ACT, AND THAT IT INTENDS THAT THESE STRICTER REQUIREMENTS GOVERN FORMER FCC OFFICIALS.

APPOINTMENT, TERMS OF OFFICE, SALARY, AND COMPENSATION OF MEMBERS OF COMMISSION

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THIS SECTION ALLOWS THE COMMISSION, UNDER CERTAIN CIRCUMSTANCES, TO ACCEPT REIMBURSEMENT FROM NON-GOVERNMENTAL ENTITIES FOR TRAVEL AND RELATED EXPENSES INCURRED BY COMMISSIONERS AND EMPLOYEES ATTENDING NON-GOVERNMENT-SPONSORED FUNCTIONS. THE PROVISION WILL EXPIRE AT THE END OF FISCAL YEAR 1985. ANY SOURCE. THE END OF FISCAL YEAR 1985.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. IN ORDER TO KEEP IN TOUCH WITH THE INDUSTRIES AND INDIVIDUALS THEY REGULATE, COMMISSIONERS AND COMMISSION EMPLOYEES HAVE FOUND IT USEFUL TO TRAVEL ON OCCASION TO DIFFERENT PARTS OF THE COUNTRY ON OFFICIAL BUSINESS TO ATTEND CONFERENCES, CONVENTIONS, AND MEETINGS. THESE TRIPS RANGE FROM COMMISSIONERS' PARTICIPATION IN INDUSTRY-WIDE CONVENTIONS, TO A BUREAU CHIEF'S PANEL APPEARANCE IN AN EDUCATIONAL INSTITUTION'S SYMPOSIUM, TO A DIVISION HEAD'S MEETING TO EXPLAIN A NEW FCC RULE TO A SMALL GROUP OF LICENSEES. GIVEN THE RAPID TECHNOLOGICAL CHANGES WHICH ARE OCCURRING IN THE TELECOMMUNICATIONS INDUSTRY, AND THE CONTINUING INTRODUCTION OF NEW COMMUNICATIONS SERVICES AND FACILITIES TO THE PUBLIC, THE ABILITY OF THE COMMISSION TO TRAVEL IS A RELATIVELY SIGNIFICANT ASPECT OF ITS SERVICE TO THE

PUBLIC. THE REIMBURSEMENT EXPERIMENT IS DESIGNED TO SUPPLEMENT APPROPRIATIONS TO THE COMMISSION DURING A PERIOD IN WHICH THE COMMISSION'S RESPONSIBILITIES, PARTICULARLY IN THE AREA OF COMMON CARRIER REGULATION, ARE PROJECTED TO INCREASE, WHILE CONGRESS MOVES TO REDUCE FEDERAL GOVERNMENT EXPENDITURES. THE COMMITTEE RECOGNIZES THAT ATTENDANCE BY COMMISSIONERS AND COMMISSION EMPLOYEES AT NON-GOVERNMENTAL CONVENTIONS AND MEETINGS GENERATE VALUABLE EXCHANGES BETWEEN GOVERNMENT OFFICIALS AND NON-GOVERNMENTAL GROUPS AND SHOULD BE ALLOWED TO CONTINUE AT REASONABLE LEVELS. APPROPRIATED TRAVEL FUNDS SAVED HEREBY SHOULD BE USED TO PAY FOR OTHER HIGH-PRIORITY NON-TRAVEL EXPENSES OF THE COMMISSION. THE CONFEREES FURTHER INTENDED THAT SUCH REIMBURSEMENT, IN GENERAL, SHOULD BE PERMISSIBLE NOTWITHSTANDING THE PROVISIONS OF ANY OTHER STATUTES, REGULATIONS, EXECUTIVE ORDERS OR SIMILAR RESTRICTIONS WHICH ORDINARILY WOULD BAR THE RECEIPT OF SUCH REIMBURSEMENTS FROM ANY SOURCE. AS PART OF THE PROGRAM OF BUDGET AUSTERITY, THE AMOUNT OF MONEY AVAILABLE FOR TRAVEL BY FEDERAL AGENCIES IS BEING REDUCED. THIS MIGHT WELL HAVE A NEGATIVE IMPACT UPON THE COMMISSION'S ABILITY TO PARTICIPATE IN INDUSTRY FUNCTIONS INTENDED TO OFFER THOSE SUBJECT TO FCC REGULATION A BETTER OPPORTUNITY TO INTERFACE WITH

COMMISSIONERS AND STAFF. AS THE AMOUNT OF MONEYS APPROPRIATED TO THE COMMISSION FOR. TRAVEL DECREASES, SMALLER ORGANIZATIONS AND NON-PROFIT OR EDUCATIONAL GROUPS IN PARTICULAR MAY FIND THEMSELVES OUT OF THE COMMISSION'S TRAVEL PICTURE. MEANWHILE, AT THE PRESENT TIME, THOSE GROUPS WHICH COULD EASILY AFFORD TO PAY THE NECESSARY EXPENSES FOR COMMISSIONERS' AND COMMISSION EMPLOYEES' TRAVEL TO THEIR FUNCTIONS ARE PREVENTED FROM DOING SO. CURRENTLY, NO INDEPENDENT REGULATORY AGENCY HAS THE AUTHORITY TO ACCEPT TRAVEL REIMBURSEMENT FROM PRIVATE PARTIES EXCEPT WITH RESPECT TO A VERY LIMITED NUMBER OF GROUPS. HOWEVER, GIVEN THE RATHER SEVERE BUDGET CONSTRAINTS FACING THE COMMISSION, PROVIDING FOR AN EXPERIMENTAL PERIOD TO TEST THE OPERATION OF A LIMITED TRAVEL REIMBURSEMENT MECHANISM OVER WHICH CONGRESS COULD EXERT STRONG OVERSIGHT, PRESERVES CONGRESSIONAL CONTROL WHILE ENHANCING BUDGETARY RESOURCES FOR TRAVEL PURPOSES. THUS, THE CONFERENCE SUBSTITUTE ESTABLISHES A LIMITED TRAVEL REIMBURSEMENT MECHANISM WHICH WILL SUNSET AFTER THREE YEARS, AND IS INTENDED TO ALLEVIATE SOME OF THE BUDGETARY PRESSURE WHICH MIGHT INHIBIT THE ABILITY OF COMMISSIONERS AND COMMISSION STAFF TO TRAVEL. TO ENSURE CONGRESSIONAL OVERSIGHT, THE AMENDMENT TO SECTION 4(B) INCLUDES THREE SIGNIFICANT LIMITATIONS ON THE COMMISSION'S REIMBURSEMENT AUTHORITY.

FIRST, THE TOTAL AMOUNT THAT THE COMMISSION COULD TRAVEL IN ANY FISCAL YEAR IS LIMITED TO THE LEVEL OF TRAVEL MONEY APPROPRIATED FOR THE COMMISSION FOR SUCH FISCAL YEAR. IN THIS WAY, THE COMMISSION IS NOT GIVEN CARTE BLANCHE WITH RESPECT TO TRAVEL, WHILE CONGRESS CONTINUES TO DECIDE THE OVERALL DEGREE OF TRAVEL WHICH WOULD BE APPROPRIATE IN ANY GIVEN YEAR. SECOND, THE COMMISSION IS REQUIRED TO REPORT TO CONGRESS, AS WELL AS PUBLICLY REPORT ANY INSTANCES IN WHICH IT RECEIVES TRAVEL REIMBURSEMENTS UNDER THIS SECTION. THIRD, THE ENTIRE TRAVEL REIMBURSEMENTS SECTION, SINCE IT IS INTENDED TO BE AN EXPERIMENT, COMMENCES WITH THE BEGINNING OF FISCAL YEAR 1983, AND SUNSETS AT THE END OF FISCAL YEAR 1985. THE CONFEREES WISH TO EMPHASIZE THAT DURING THIS EXPERIMENTAL PERIOD, THE COMMISSION IS NOT TO NEGLECT GROUPS OR ORGANIZATIONS WHICH DO NOT HAVE THE MEANS TO REIMBURSE THE COMMISSION FOR ITS TRAVEL EXPENSES. THE CONFEREES INTEND THAT THE COMMISSION ATTEND AND PARTICIPATE IN CONVENTIONS, CONFERENCES, AND MEETINGS HELD BY NON-PROFIT, PUBLIC. INTEREST, EDUCATIONAL, AND OTHER GROUPS AT ROUGHLY THE SAME OR HIGHER LEVEL AS IN PREVIOUS YEARS. THE AMOUNT OF REIMBURSEMENT PERMITTED IS LIMITED TO THE TRAVEL APPROPRIATION SPECIFIER BY CONGRESS FOR EACH FISCAL YEAR CONGRESS MAY WISH TO RAISE THE PRESENT CEILING ON COMMISSION TRAVEL IF

IT FEELS THAT ADDITIONAL TRAVEL IS WARRANTED, PARTICULARLY IF IT APPEARS THAT SUCH ADDITIONAL TRAVEL WOULD LIKELY BE FUNDED BY NON-GOVERNMENTAL SOURCES. THE CONFEREES INTEND THAT, IN THE ABSENCE OF AN EXPRESS LIMITATION ON THE AMOUNT OF MONEYS WHICH THE COMMISSION CAN EXPEND ON ANY GIVEN FISCAL YEAR, THE REIMBURSEMENT LIMIT WILL BE THE FIGURE LISTED AS TRAVEL AND TRANSPORTATION OF PERSONS CONTAINED IN THE PRESIDENT'S ANNUAL BUDGET ESTIMATE FOR THE COMMISSION. APPROPRIATED TRAVEL MONEYS SAVED THROUGH THE REIMBURSEMENT MECHANISM MAY BE 'REPROGRAMMED' BETWEEN PROGRAMS AND ACTIVITIES FOR OTHER USES IN THE COMMISSION'S BUDGET TO THE EXTENT PERMISSIBLE UNDER EXISTING LAW. THESE LIMITS MAY BE EXCEEDED ONLY UPON WRITTEN APPROVAL BY BOTH HOUSE AND SENATE APPROPRIATIONS COMMITTEES. THE CONFEREES NOTE THAT THE COMMISSION CURRENTLY HAS EXPERIENCE WITH THE TRAVEL REIMBURSEMENT PROCESS, SINCE FEDERAL LAW PERMITS ACCEPTANCE OF REIMBURSEMENT FROM CERTAIN PRIVATE NON-PROFIT ORGANIZATIONS FOR GOVERNMENT TRAVEL EXPENSES. SEE, E.G., 5 U.S.C. 4101 ET. SEQ. UNDER ITS CURRENT PRACTICE, THE COMMISSION PAYS ALL THE PROPER EXPENSES OF THE COMMISSION TRAVELER FROM ITS GENERAL APPROPRIATION; SUBSEQUENTLY, THE COMMISSION BILLS AND RECEIVES REIMBURSEMENT FROM THE SPONSORING PRIVATE NON-PROFIT ORGANIZATION,

CREDITING ITS APPROPRIATION BY THE AMOUNT OF REIMBURSEMENT. THE COMMITTEE INTENDS THAT THESE PROCEDURES SERVE AS THE MODEL FOR IMPLEMENTATION OF THIS PROVISION NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW. SEE 31 U.S.C. 484 (1976). IN NO INSTANCE SHOULD PRIVATE ENTITIES MAKE DIRECT PAYMENTS TO OK PROVIDE TRANSPORTATION TICKETS FOR COMMISSIONER OR COMMISSION EMPLOYEES. THE QUARTERLY REPORTS REQUIRED BY SECTION 3 SHALL CONSIST OF THE FOLLOWING INFORMATION: A) THE DATES AND BRIEF DESCRIPTION OF THE PRIVATE EVENT, B) THE NAME AND ADDRESS OF THE SPONSORING ORGANIZATION, C) NUMBER OF COMMISSIONERS, AND NUMBER AND TITLE OF EMPLOYEES WHO ATTENDED THE EVENT, AND D) THE TOTAL AMOUNT OF REIMBURSEMENT, SUBDIVIDED INTO TRAVEL, ROOM, BOARD, AND OTHER EXPENSES. THESE SHALL BE FILED, WITHIN THIRTY DAYS AFTER THE CLOSE OF EACH FISCAL QUARTER, WITH THE HOUSE AND SENATE COMMERCE AND APPROPRIATIONS COMMITTEES.

USE OF AMATEUR VOLUNTEERS FOR CERTAIN PURPOSES

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE AMENDMENT PROVIDED A STATUTORY BASIS FOR THE PRESENT COMMISSION PRACTICE OF PERMITTING AMATEURS OF A HIGHER LICENSE CLASS TO VOLUNTARILY ADMINISTER NOVICE (ENTRY) CLASS AMATEUR RADIO LICENSE EXAMINATIONS TO CANDIDATES AND EXTENDS THE CONCEPT TO INCLUDE THE VOLUNTEER ADMINISTRATION OF ALL CLASSES OF AMATEUR LICENSES. TO GUARD AGAINST CONFLICTS OF INTEREST, PERSONS WHO OWN A SIGNIFICANT INTEREST IN OR ARE EMPLOYEES OF ANY ENTITY INVOLVED IN THE MANUFACTURE OF DISTRIBUTION OF AMATEUR RADIO EQUIPMENT, OR INVOLVED IN THE PREPARATION OR DISTRIBUTION OF PUBLICATIONS WHICH MAY BE USED AS STUDY AIDS FOR AMATEUR LICENSE EXAMS ARE DISQUALIFIED FROM VOLUNTEERING TO ADMINISTER AMATEUR EXAMS. THE SENATE AMENDMENT ALSO AUTHORIZES THE COMMISSION TO UTILIZE THE VOLUNTEER ASSISTANCE OF AMATEUR LICENSEES IN THE PREPARATION OF AMATEUR LICENSE EXAMS, NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW. SEE GENERALLY, 31 U.S.C. 665(D) (1976.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. THERE ARE FIVE CLASSES OF AMATEUR RADIO LICENSES WITH ADMISSION TO HIGHER LICENSE CLASSES CONTINGENT UPON THE SATISFACTORY COMPLETION OF PROGRESSIVELY MORE CHALLENGING LICENSE EXAMINATIONS.

THESE EXAMINATIONS ARE PRESENTLY ADMINISTERED BY FCC PERSONNEL, GENERALLY THOSE IN THE FIELD OPERATIONS BUREAU. DUE TO RESOURCE AND PERSONNEL REDUCTIONS, THE OPPORTUNITY TO TAKE AMATEUR LICENSE EXAMINATIONS IS EXTREMELY LIMITED. IN SOME AREAS OF THE UNITED STATES, AMATEUR EXAMINATIONS CAN ONLY BE GIVEN ONCE PER YEAR AS A RESULT OF SHORTAGES OF PERSONNEL IN THE COMMISSIONS FIELD OPERATIONS BUREAU. SHOULD A PERSON NOT PASS AN AMATEUR EXAMINATION THE FIRST TIME, UP TO TWO YEARS CAN PASS WITHOUT AN INDIVIDUAL HAVING AN AMATEUR LICENSE. THE BENEFITS OF AMATEUR RADIO TO INDIVIDUALS, ESPECIALLY YOUNG PEOPLE, INCLUDING TECHNICAL SELF-TRAINING AND KNOWLEDGE OF ELECTRONICS SHOULD NOT BE DENIED TO SUCH PERSONS ON THE BASIS OF PERSONNEL SHORTAGES AT THE COMMISSION. TO HELP ALLEVIATE THIS PROBLEM, FOR SEVERAL YEARS AMATEURS OF A HIGHER LICENSE CLASS HAVE VOLUNTARILY ADMINISTERED NOTICE (ENTRY) CLASS AMATEUR RADIO LICENSE EXAMINATIONS TO CANDIDATES. AFTER ADMINISTERING THE EXAM, THE VOLUNTEER MAILS THE WRITTEN PORTION OF THE EXAM TO THE COMMISSION FOR GRADING. THIS HAS SAVED COMMISSION RESOURCES AND PROVIDED A CONVENIENT METHOD OF ADMINISTERING THESE ENTRY LEVEL EXAMINATIONS, ESPECIALLY TO YOUNG PEOPLE INTERESTED IN RADIO. THE CONFEREES BELIEVES THAT THIS USE OF VOLUNTEER SERVICES BY LICENSED AMATEURS BY

THE COMMISSION IS A BENEFICIAL AND EFFICIENT UTILIZATION OF MANPOWER IN THE PUBLIC INTEREST. THUS, THE CONFERENCE SUBSTITUTE PROVIDES A STATUTORY BASIS FOR PRESENT COMMISSION PRACTICE AND EXTENDS THE CONCEPT TO INCLUDE THE VOLUNTEER ADMINISTRATION OF ALL CLASSES OF AMATEUR LICENSES. TO GUARD AGAINST CONFLICTS OF INTEREST, PERSONS WHO OWN A SIGNIFICANT INTEREST IN OR ARE EMPLOYEES OF ANY ENTITY INVOLVED IN THE MANUFACTURE OR DISTRIBUTION OF AMATEUR RADIO EQUIPMENT, OR INVOLVED IN THE PREPARATION OR DISTRIBUTION OF PUBLICATIONS WHICH MAY BE USED AS STUDY AIDS FOR AMATEUR LICENSE EXAMS ARE DISQUALIFIED FROM VOLUNTEERING TO ADMINISTER AMATEUR EXAMS. THIS PROVISION ALSO AUTHORIZES THE COMMISSION TO UTILIZE THE VOLUNTEER ASSISTANCE OF AMATEUR LICENSEES IN THE PREPARATION OF AMATEUR LICENSE EXAMS, NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW. SEE GENERALLY, 31 U.S.C. 66503) (1976). THE FCC'S FAILURE TO UPDATE AND REVISE WRITTEN EXAMINATIONS HAS RESULTED, THROUGH REPETITION, IN COMPROMISE OF THE EXAMINATION SYSTEM. THE CONFEREES NOTE THAT AT LEAST ONE FIRM HAS PUBLISHED STUDY AIDS WHICH INCLUDE THE EXACT QUESTIONS CONTAINED IN CURRENT FCC AMATEUR LICENSE EXAMS. THIS HAS ENABLED SOME TO PASS AMATEUR EXAMS ON THE BASIS OF ROTE MEMORY RATHER THAN AN UNDERSTANDING OF FCC REGULATIONS. BY

PERMITTING THE COMMISSION TO ACCEPT SUGGESTED QUESTIONS FOR VARIOUS CLASSES OF AMATEUR LICENSE EXAMS FROM THE LICENSEES THEMSELVES OR FROM AMATEUR RADIO OPERATOR ORGANIZATIONS, THE COMMISSION WILL BE ABLE TO AMASS A LARGER POOL OF EXAMINATION QUESTIONS. THE CONFEREES EXPECT THAT VOLUNTEERING INDIVIDUALS AND ORGANIZATIONS WILL PROTECT AGAINST THE PREMATURE DISCLOSURE TO THE PUBLIC OF SUBMITTED QUESTIONS. ANOTHER IMPORTANT CONSEQUENCE OF THE DIMINISHING RESOURCES OF THE COMMISSION'S FIELD OPERATIONS BUREAU, IS THE INADEQUACY OF MONITORING AND ENFORCEMENT SERVICES IN BOTH THE AMATEUR AND CITIZENS BAND (CB) RADIO SERVICES. THIS SECTION AUTHORIZES THE USE OF VOLUNTEERS FROM THE AMATEUR AND CB RADIO SERVICES TO ASSIST THE COMMISSION IN MONITORING FOR VIOLATIONS IN THEIR RESPECTIVE SERVICES. WHILE THESE VOLUNTEERS MAY ISSUE ADVISORY NOTICES TO APPARENT VIOLATORS, THEY MAY NOT IMPOSE SANCTIONS OR TAKE ANY OTHER ENFORCEMENT ACTION AGAINST VIOLATORS. SEE SECTION 4(F)4(C) AND (D) OF THE COMMUNICATIONS ACT OF 1934. THIS PROVISION ALSO MAKES IT CLEAR THAT ALL VOLUNTEERS WILL SERVE WITHOUT COMPENSATION AND WILL NOT BE DEEMED EMPLOYEES OF THE FEDERAL GOVERNMENT FOR THE PURPOSE OF RECEIVING ANY BENEFITS AS A RESULT OF THEIR SERVICES. THE CONFERENCE SUBSTITUTE SHOULD HELP CONSERVE COMMISSION RESOURCES BY GIVING

STATUTORY APPROVAL TO THE USE OF AMATEUR RADIO VOLUNTEERS WHO WILL COMPLEMENT THE COMMISSION'S STAFF IN CARRYING OUT LICENSING AND MONITORING RESPONSIBILITIES. THE USE OF CB VOLUNTEERS FOR MONITORING ASSIGNMENTS SHOULD YIELD SIMILAR BENEFITS.

ORGANIZATION AND FUNCTIONING OF COMMISSION

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE REDUCED THE MINIMUM COMPOSITION OR QUORUM OF THE FCC'S REVIEW BOARD ESTABLISHED BY SECTION 5(D) OF THE COMMUNICATIONS ACT OF 1934, FROM THREE TO TWO EMPLOYEES.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. SECTION 556(B) OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. SS 556(B), PROVIDES THAT A FEDERAL ADMINISTRATIVE AGENCY MAY DESIGNATE EMPLOYEE BOARDS TO PRESIDE OVER SPECIFIED CLASSES OF PROCEEDINGS. THE FCC'S EMPLOYEE BOARD, WHICH IS KNOWN AS THE REVIEW BOARD, ON OCCASION, HAS NOT BEEN ABLE TO ISSUE

DECISIONS EITHER BECAUSE ONE OF ITS MEMBERS WAS DISQUALIFIED FROM PARTICIPATING IN A PARTICULAR PROCEEDING, A MEMBER WAS ABSENT DUE TO LONG ILLNESS OR BECAUSE A VACANCY ON THE BOARD WAS UNFILLED. BY REDUCING THE BOARD'S MINIMUM COMPOSITION OR QUORUM REQUIREMENT TO TWO EMPLOYEES, THE PROBLEMS CAUSED BY DISQUALIFICATION, PROLONGED ILLNESS, AND PROLONGED VACANCIES SHOULD BE ALLEVIATED. WHERE A DEADLOCK OCCURS ON A TWO- MEMBER PANEL, THE COMMITTEE EXPECTS THAT SUCH PROCEEDINGS BE CERTIFIED TO THE FULL COMMISSION FOR FINAL DISPOSITION. THIS SECTION ALSO DELETES OBSOLETE LANGUAGE.

POLE ATTACHMENTS

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE REPEALED SECTION 224(D) AND 224(E) OF THE COMMUNICATIONS ACT OF 1934.

CONFERENCE SUBSTITUTE

THE CONFEREES AGREED TO THE SENATE PROVISION DELETING SECTION 224(E) BUT VOTED TO RETAIN SECTION 224(D) IN CURRENT LAW. ON FEBRUARY 21, 1978, THE PRESIDENT SIGNED INTO

LAW P.L. 95- 234, WHICH GRANTS THE FEDERAL COMMUNICATIONS COMMISSION JURISDICTION TO REGULATE THE RATES, TERMS, AND CONDITIONS FOR THE ATTACHMENT OF CABLE SYSTEM TRANSMISSION LINES TO UTILITY POLES, WHERE POLE ATTACHMENTS ARE NOT REGULATED BY A STATE. THE PURPOSE OF REQUIRING THE REGULATION OF THE POLE ATTACHMENT RATES WAS TO PROVIDE THAT THE RATES ARE 'JUST AND 'REASONABLE'. THE STATUTE IMPOSES A METHODOLOGY ON THE FCC TO DETERMINE APPROPRIATE RATES. THIS METHODOLOGY EXPIRES FIVE YEARS AFTER THE DATE OF ENACTMENT. THE POLE ATTACHMENT ACT HAS BROUGHT CONSIDERABLE CERTAINTY REGARDING THE PRICE OF ACCESS TO UTILITY POLES. FURTHER, IT HAS ENCOURAGED PRIVATE SETTLEMENTS BY PARTIES TO A DISPUTE. IT HAS SAVED THE FCC MONEY BY REDUCING THE NUMBER OF DISPUTES BROUGHT TO THE COMMISSION FOR ADMINISTRATIVE ACTION. THE FCC HAS ADMINISTERED THE METHODOLOGY SET FORTH IN SUBSECTION (D) BY APPLYING A FORMULA WHICH DEALS WITH ALL PARTIES CONCERNED. THE CONFEREES RECOGNIZED THAT THE FCC HAS THE DISCRETION TO CONTINUE TO USE THE STANDARD CALLED FOR IN SECTION 224(I)) IF THAT SUBSECTION WERE PERMITTED TO EXPIRE. FURTHER, THE COMMISSION HAS SHOWN NO INDICATION THAT IT WOULD CHANGE THE EXISTING FORMULA. IN THE EVENT THAT THE REQUIREMENT OF THE FORMULA ESTABLISHED BY SECTION 224(D) WERE PERMITTED TO EXPIRE, IT

WOULD INCREASE THE LIKELIHOOD THAT PARTIES WOULD PETITION TO ALTER THE FORMULA BY RULEMAKING, WITH RESULTING INCREASED BURDEN ON THE FCC AND UNCERTAINTY IN THE INDUSTRY UNTIL SUCH ISSUES WERE RESOLVED. FINALLY, THE CONFEREES RECOGNIZED THAT SECTION 224(E) WAS ADDED TO THE SECTION BECAUSE CONGRESS WAS UNCERTAIN WHETHER THE METHODOLOGY ESTABLISHED BY THE STATUTE WOULD WORK. IN THE FACE OF EVIDENCE INDICATING THE EFFECTIVENESS OF THIS PROVISION, THE CONFEREES AGREED THAT IT SHOULD REMAIN IN THE STATUTE. ACCORDINGLY, THE SUNSET PROVISION OF SECTION 224 HAS BEEN DELETED, WHILE THE METHODOLOGY ESTABLISHED IN THAT SECTION WILL REMAIN IN FORCE.

JURISDICTION OF COMMISSION

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE AMENDED SECTION 301 OF THE COMMUNICATIONS ACT OF 1934 TO MAKE CLEAR. THAT THE COMMISSION'S JURISDICTION OVER RADIO COMMUNICATIONS EXTENDS TO INTRASTATE AS WELL AS INTERSTATE TRANSMISSIONS.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. THE PRESENT STATUTORY AMBIGUITY IMPOSES WASTEFUL BURDENS ON THE COMMISSION AND VARIOUS UNITED STATES ATTORNEYS, PARTICULARLY WITH REGARD TO PROSECUTION OF CITIZENS BAND (CB) RADIO OPERATORS TRANSMITTING IN VIOLATION OF FCC RULES. TYPICALLY IN SUCH A CASE, THE DEFENDANTS CONCEDE THE VIOLATION, BUT CHALLENGE THE FEDERAL GOVERNMENT'S JURISDICTION ON THE GROUND THAT THE CB TRANSMISSION DID NOT CROSS STATE LINES. TO REFUTE THIS ARGUMENT, THE COMMISSION INVARIABLY IS ASKED TO FURNISH ENGINEERING DATA AND EXPERT WITNESSES, OFTEN AT CONSIDERABLE EXPENSE. IN MOST INSTANCES, ONCE THE EXPERT EVIDENCE IS MADE AVAILABLE, THE DEFENDANTS PLEAD GUILTY AND THE CASE TERMINATED. THE PROVISION WOULD END THESE WASTEFUL PROCEEDINGS. FURTHER, IT WOULD MAKE SECTION 301 CONSISTENT WITH JUDICIAL DECISIONS HOLDING THAT ALL RADIO SIGNALS ARE INTERSTATE BY THEIR VERY NATURE. SEE, E.G., FISHER'S BLEND STATION INC. V. TAX COMMISSION OF WASHINGTON STATE, 297 U.S. 650, 655 (1936).

INTERFERENCE WITH ELECTRONIC EQUIPMENT

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

THE SENATE AMENDS SECTION 302(A) OF THE COMMUNICATIONS ACT OF 1934 AND AUTHORIZES THE COMMISSION TO ESTABLISH MINIMUM PERFORMANCE STANDARDS FOR 'HOME ELECTRONIC EQUIPMENT AND SYSTEMS' TO TAKE APPROPRIATE ACTION IN ORDER TO PROTECT SUCH EQUIPMENT FROM RADIO FREQUENCY INTERFERENCE (PFI).

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. FOR MANY YEARS, PUBLIC COMPLAINTS HAVE PERSISTED ABOUT RADIO FREQUENCY INTERFERENCE TO CONSUMER ELECTRONIC EQUIPMENT, SUCH AS TELEVISION SETS AND RADIO RECEIVERS. THIS INTERFERENCE HAS OFTEN BEEN ATTRIBUTED TO TRANSMISSIONS FROM THE AMATEUR AND CITIZENS BAND (CB) RADIO SERVICES. THE CONFEREES WISH TO EMPHASIZE THAT IT WAS ITS HOPE THAT VOLUNTARY EFFORTS BY MANUFACTURERS TO REDUCE RFI WHEN POSSIBLE, AS OPPOSED TO THE USE OF GOVERNMENT REGULATION, WOULD BE SUFFICIENT. DEVICES DESIGNED AND MARKETED FOR USE IN A COMMERCIAL ENVIRONMENT NORMALLY INCLUDE NECESSARY PROTECTION AGAINST INTERFERENCE AND DO NOT REQUIRE COMMISSION REGULATION. IN THE MARKET FOR

HOME DEVICES, HOWEVER, GOOD FAITH INDUSTRY ATTEMPTS TO SOLVE THIS INTERFERENCE PROBLEM HAVE NOT ALWAYS BEEN AS SUCCESSFUL. THUS, IN VIEW OF COMPLAINTS REGARDING HOME DEVICES, THE CONFEREES BELIEVE THAT COMMISSION AUTHORITY TO IMPOSE APPROPRIATE REGULATIONS ON HOME ELECTRONIC EQUIPMENT AND SYSTEMS IS NOW NECESSARY TO INSURE THAT CONSUMERS' HOME ELECTRONIC EQUIPMENT AND SYSTEMS WILL NOT BE SUBJECT TO MALFUNCTION DUE TO RFI. HOWEVER, THE LEGISLATION DOES NOT MANDATE COMMISSION EXERCISE OF THIS AUTHORITY; THAT DECISION IS WELL WITHIN THE TECHNICAL EXPERTISE OF THE AGENCY. THE CONFEREES INTEND THAT THE COMMISSION'S AUTHORITY APPLY ONLY TO HOME ELECTRONIC EQUIPMENT AND SYSTEMS LIKELY TO BE FOUND IN A PRIVATE RESIDENCE AND INTENDED FOR RESIDENTIAL USE, AS DISTINGUISHED FROM DEVICES INTENDED FOR OFFICE AND BUSINESS USE. RADIO AND TELEVISION SETS WOULD BE TYPICAL EXAMPLES OF EQUIPMENT SUBSUMED UNDER THE TERMS 'HOME ELECTRONIC EQUIPMENT AND SYSTEMS.' OTHER EXAMPLES INCLUDE HOME BURGLAR ALARM AND SECURITY SYSTEMS, AUTOMATIC GARAGE DOOR OPENERS, ELECTRONIC ORGANS, RECORD TURNTABLES, AND STEREO/HIGH FIDELITY AMPLIFIER SYSTEMS. ALTHOUGH THIS LEGISLATION IS AIMED PRIMARILY AT HOME EQUIPMENT AND SYSTEMS, IT IS NOT INTENDED TO PREVENT THE COMMISSION FROM ADOPTING STANDARDS FOR SUCH DEVICES WHICH ARE ALSO

USED OUTSIDE THE HOME. PORTABLE TV RECEIVERS AND RADIOS AS WELL AS MEDICAL ALERT DEVICES, FOR INSTANCE, ARE INTENDED TO BE COVERED. A NUMBER OF ALTERNATIVES ARE AVAILABLE TO THE COMMISSION IN EXERCISING THE AUTHORrrY GRANTED HEREUNDER. THE COMMISSION COULD DIRECT MANUFACTURERS OF SOME TYPES OF HOME ELECTRONIC EQUIPMENT AND SYSTEMS TO MEET CERTAIN MINIMAL STANDARDS BY INCORPORATING AN INTERFERENCE SUPPRESSION CAPABILITY INTO THEIR DEVICES BEFORE THE EQUIPMENT IS OFFERED FOR SALE. ON THE OTHER HAND, THE COMMISSION MAY CHOOSE TO REQUIRE ONLY A WARNING LABEL ON THOSE TYPES OF HOME ELECTRONIC EQUIPMENT AND SYSTEMS FOR WHICH THE INSTALLATION OF FILTERING, SHIELDING OR OTHER INTERFERENCE SUPPRESSION COMPONENTS WOULD BE UNREASONABLY COSTLY IN RELATION TO THE TOTAL PRICE OF THE DEVICE, OR WHERE SUCH INSTALLATION OTHERWISE IS UNREASONABLE OR IMPRACTICAL. SUCH A WARNING COULD BE GIVEN IN A PAMPHLET OR TAG ACCOMPANYING THE EQUIPMENT, AND MARKETPLACE FORCES WOULD DETERMINE THE SUCCESS OF PARTICULAR COMPETITORS WHO CHOSE TO RELY ON SUCH WARNINGS INSTEAD OF ACTUALLY BUILDING IN THE FILTERING DEVICES NECESSARY TO FULLY PROTECT AGAINST INTERFERENCE. THE CONFEREES EXPECT THE COMMISSION TO EXERCISE THE AUTHORITY GRANTED HEREIN, AS IT HAS EXERCISED THE AUTHORTTY GRANTED UNDER SECTION 302 OF THE

COMMUNICATIONS ACT OF 1934, BY BALANCING THE COST OF IMPROVING THE PERFORMANCE OF A DEVICE TO PARTICULAR LEVELS AGAINST THE BENEFITS TO BE GAINED FROM REQUIRING MANUFACTURERS TO MEET STANDARDS OF VARIOUS LEVELS OF STRINGENCY. IN SO DOING, THE CONFEREES EXPECT THE NUMBER OF INTERFERENCE COMPLAINTS RECORDED AND INVESTIGATED BY THE COMMISSION TO BE SIGNIFICANTLY REDUCED. THE CONFERENCE SUBSTITUTE IS FURTHER INTENDED TO CLARIFY THE RESERVATION OF EXCLUSIVE JURISDICTION TO THE FEDERAL COMMUNICATIONS COMMISSION OVER MATTERS INVOLVING RFI. SUCH MATTERS SHALL NOT BE REGULATED BY LOCAL OR STATE LAW, NOR SHALL RADIO TRANSMITTING APPARATUS BE SUBJECT TO LOCAL OR STATE REGULATION AS PART OF ANY EFFORT TO RESOLVE AN RFI COMPLAINT. THE CONFEREES BELIEVE THAT RADIO TRANSMITTER OPERATORS SHOULD NOT BE SUBJECT TO FINES, FORFEITURES OR OTHER LIABILITY IMPOSED BY ANY LOCAL OR STATE AUTHORITY AS A RESULT OF INTERFERENCE APPEARING IN HOME ELECTRONIC EQUIPMENT OR SYSTEMS. RATHER, THE CONFEREES INTEND THAT REGULATION OF RFI PHENOMENA SHALL BE IMPOSED ONLY BY THE COMMISSION.

QUALIFICATIONS OF STATION OPERATORS

HOUSE BILL

THE HOUSE BILL CONTAINED NO PROVISION.

SENATE AMENDMENT

SECTION 303(1) OF THE COMMUNICATIONS ACT AUTHORIZES THE COMMISSION TO GRANT RADIO OPERATOR LICENSES TO CITIZENS AND NATIONALS OF THE UNITED STATES. THE SENATE BROADENED THIS CATEGORY TO INCLUDE ALIENS WHO ARE LEGALLY ELIGIBLE FOR EMPLOYMENT IN THE UNITED STATES.

CONFERENCE SUBSTITUTE

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION. UNDER CURRENT LAW, ALIENS MUST UNDERGO AN EXTENSIVE TIME AND RESOURCE CONSUMING WAIVER PROCEDURE TO OBTAIN COMMERCIAL RADIO OPERATOR LICENSES. FOR EXAMPLE, AN ALIEN AIRCRAFT MECHANIC OR BAGGAGE

* * *

APPENDIX BB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

[Dated November 21, 1996]

No. 2:96-CV-295

GRAEME AND MARY BETH FREEMAN, et al.,
Appellants,

v.

BURLINGTON BROADCASTERS, INC., et al.,
Appellees.

AFFIDAVIT OF MARK F. HUTCHINS

I, Mark F. Hutchins, under oath, do hereby state and depose as follows:

1. My name is Mark F. Hutchins. I am a Broadcast Engineer residing in Brattleboro, Vermont. I am the same Mark F. Hutchins who signed an affidavit in this proceeding dated November 19, 1996.

2. My credentials are set forth in my Affidavit dated November 19, 1996, which is identified as Appellants' Exhibit M.

3. Radiofrequency emissions are a form of transmitted electromagnetic energy whose frequencies, or wavelengths, piece them in the non-ionizing radiation portion of the electromagnetic spectrum. That energy can have three effects. First, it can have the presumed intended effect of delivering a signal to serve the communications purpose. Second, there can be a direct health effect due to excessive exposure as discussed by the Federal Communications Commission in its Report And Order 96-326 regarding ET Docket 93-62; and an indirect health effect from electromagnetic interference (EMI) to medical devices, as outlined by the Food and Drug Administration in 1995, reporting on its follow-up of over 100 suspected incidents of EMI with medical devices. Third, the emitted signal can cause interference to electrical and electronic devices.

Dated at Brattleboro, Vermont, this 21st day of November, 1996.

/s/_____
Mark F. Hutchins

STATE OF VERMONT)
) SS:
WINDHAM COUNTY)

Subscribed and sworn to before me this 21st day of November, 1996.

/s/_____
Norma A. Willingham,
Notary Public

APPENDIX CC

T.24 § 4407

§ 4407. Permitted types of regulations

Any municipality may adopt zoning regulations that may include, shall not be limited to, any of the following provisions:

(1) **Agricultural and rural residential, forest, and recreation districts**. Where, for the purposes set forth in section 4302 of this title is deemed necessary to safeguard certain areas from urban or suburban development and to encourage such development in other areas of municipality or region, the following districts may be created:

(A) Agricultural and rural residential districts, permitting all of agricultural uses, and prohibiting all other land development except for residential lots of not less than twenty-five acres each;

(B) Forest districts, permitting commercial forestry and related uses, and prohibiting all other land development;

(C) Recreational districts, permitting camps, ski areas and relat recreational facilities including lodging for transients, and seasonal residents, and prohibiting all other land development except for struction of residences for occupancy by caretakers and their families.

(2) **Conditional uses**. In any district, certain uses may be permit; only by approval of the board of adjustment or the development review board, if general and specific standards to which each permitted use conform are prescribed in the appropriate bylaws and if the board adjustment or development review board after public notice and public hearing determines that the proposed use will conform to such standards. Such general standards shall require that the proposed conditional shall not adversely affect:

(A) The capacity of existing or planned community facilities;

(B) The character of the area affected;

(C) Traffic on roads and highways in the vicinity;

(D) Bylaws then in effect; or

(E) Utilization of renewable energy resources.

Such specific standards may include requirements with respect to:

(A) Minimum lot size;

(B) Distance from adjacent or nearby uses;

(C) Performance standards, as under subdivision (7) of this section

(D) Minimum off-street parking and loading facilities;

(E) Landscaping and fencing;

(F) Design and location of structures and service areas;

(G) Size, location, and design of signs;

(H) Such other factors as the zoning regulations may include.

In granting such conditional use, the board of adjustment or the development review board may attach such additional reasonable conditions and safeguards as it may

deem necessary to implement the purpose of this chapter and the zoning regulations. The board of adjustment or the development review board shall act to approve or disapprove any such requested conditional use within sixty days after the date of the final public hearing held under this section, and failure to so act within such period shall be deemed approval.

(3) **Planned residential development.** Any municipality may adopt zoning regulations providing for planned residential development to enable and encourage flexibility of design and development of land in such a manner as to promote the most appropriate use of land, to facilitate the adequate and economical provision of streets and utilities, and to preserve the natural and scenic qualities of the open lands of this state. The modification of zoning regulations by the planning commission or the development review board may be permitted simultaneously with the approval of a subdivision plan, subject to the following conditions:

(A) The submission of a site plan to the planning commission or the development review board showing the location, height and spacing c buildings, open spaces and their landscaping, streets, driveways and off-street parking spaces and all other physical features, accompanied by a statement setting forth the nature of all proposed modifications changes or supplementations of existing zoning regulations;

(B) If authorized in the bylaw the permitted number of dwelling units may include a density increase of as much as 25 percent beyond the number which could be permitted in the planning commission's or the development review board's judgment, if the land were subdivided into lots in

conformance with the zoning regulations for the districts in which such land is situated, giving due consideration to site conditions limiting development, such as shallow depth of soil, wetness and steep slopes. When a bylaw authorizes a density increase, no person shall be required to apply for or accept a density increase. In granting a density increase, the planning commission or the development review board shall consider the capacities of community facilities and services and the character of the area affected;

(C) The-dwelling units permitted may, at the discretion of the planning commission or the development review board, be of varied types including one-family, two-family or multi-family construction;

(D) If the application of this procedure results in lands available for park, recreation, open space or other municipal purposes, the planning commission or the development review board as a condition of its approval may establish such conditions on the ownership, use and maintenance of such lands as it deems necessary to assure the preservation of such lands for their intended purposes;

(E) Any modification of the zoning regulations approved under this section shall be specifically set forth in terms of standards and criteria for the design, bulk and spacing of buildings and the sizes of lots and open spaces which shall be required, and these shall be noted or appended to the plat.

(4) **Parking and loading facilities.** Provisions setting forth standards for permitted and required facilities for off-street parking and loading which may vary by district and

by uses within each district. Such regulations may also include provisions covering the location, size, design, access, landscaping and screening of such facilities. In determining the number and size of parking spaces required under such regulations, the municipal planning commission may take into account the existence of "transit passes," and other evidence that employers will save parking spaces because employees commute to and from work in carpools, in van pools, by bicycle, or by foot. The actual number of parking spaces saved may be substituted for parking facilities on a one-for-one basis, provided the number of parking spaces saved becomes a condition of the permit that the employer receives from the municipal planning commission.

(5) **Site plan approval**. As prerequisite to the approval of any use other than one- and two-family dwellings, the approval of site plans by the planning commission or the development review board may be required. In reviewing site plans, the planning commission or the development review board may impose appropriate conditions and safeguards with respect to: the adequacy of traffic access, circulation and parking; landscaping and screening; the protection of the utilization of renewable energy resources; and other matters specified in the bylaws. The planning commission or the development review board shall act to approve or disapprove any such site plan within 60 days after the date upon which it receives the proposed plan, and failure to so act within such period shall be deemed approval. The zoning regulations shall specify the maps, data and other information to be presented with applications for site plan approval.

(6) **Design control districts**. Zoning regulations may contain provisions for the establishment of design control

districts. Prior to the establishment of such a district, the planning commission shall prepare a report describing the particular planning and design problems of the proposed district and setting forth a design plan for the areas which shall include recommended planning and design criteria to guide future development. The planning commission shall hold a public hearing, after public notice, on such report. After such hearing, the planning commission may recommend to the legislative body such design control district. A design control district can be created for any area containing structures of historical, architectural or cultural merit, and other areas in which there is a concentration of community interest and participation such as a central business district, civic center or a similar grouping or focus of activities. Such areas may include townscape areas which resemble in important aspects the earliest permanent settlements, including a concentrated urban settlement with striking vistas, views extending across open fields and up to the forest edge, a central focal point and town green, and buildings of high architectural quality including styles of the early nineteenth century. Within such a designated design control district no structure may be erected, reconstructed, substantially altered, restored, moved, demolished or changed in use or type of occupancy without approval of the plans therefor by the planning commission or the development review board. A design review board may be appointed by the legislative body of the municipality to advise any development review board and the planning commission, which design review board shall have such term of office, and such procedural rules, as the legislative body determines.

(7) **Performance standards.** As an alternative or supplement to the listing of specific uses permitted in districts

specifically in, but not limited to, manufacturing or industrial districts, zoning regulations may specify acceptable standards or levels of performance which will be required in connection with any use. Such regulations shall specifically describe the levels of operation which are acceptable and not likely to affect adversely the use of the surrounding area by the emission of such dangerous or objectionable elements as noise, vibration, smoke, dust, odor, or other form of air pollution, heat, cold, dampness, electromagnetic or other disturbance, glare, liquid or solid refuse or wastes; or create any dangerous, injurious, noxious, fire, explosive, or other hazard. The land planning policies and development regulations manual shall contain recommended forms of alternative performance standards, and the assistance of the agency of commerce and community development shall be available to any municipality which requests aid in the adoption or enforcement of such regulations.

(8) **Bonds to assure restoration of sites**. Regulations governing the operation of sand and gravel excavations or soil removal may contain provisions requiring the submission of an acceptable plan for the rehabilitation of the site at the conclusion of the operations and a bond, escrow account, or other surety acceptable to the legislative body of the municipality to assure the rehabilitation. However, this provision does not apply to mining or quarrying.

(9) **Flood plain areas, special control**. Within any area designated by the department of environmental conservation as subject to periodic flooding, the permitted uses, type of construction, and height of floor levels above ground may be regulated in order to lessen or avoid the

hazards to persons and damage to property resulting from the accumulation of storm or flood waters.

(10) **Airport hazard area.** Any municipality may adopt special zoning regulations governing the use of land, location and size of buildings and density of population within a distance of two miles from the boundaries of an airport under an approach zone and for a distance of one mile from the boundaries of such airport elsewhere. The designation of such area and the zoning regulations therein shall be approved by the Vermont transportation board.

(11) [Repealed.]

(12) **Planned unit development.** Any municipality may adopt zoning regulations providing for planned unit developments to encourage new communities, innovation in design and layout, and more efficient use of land. The modification of zoning regulations by the planning commission or the development review board may be permitted simultaneously with the approval of a subdivision plat subject to the conditions set forth in this subdivision. Any local zoning regulations containing provisions for planned unit development shall describe the standards and conditions by which a proposed planned unit development shall be evaluated. The planning commission or the development review board may prescribe, from time to time, rules and regulations to supplement the standards and conditions set forth in the zoning regulations, provided the rules and regulations are not inconsistent with the zoning regulations. The planning commission or the development review board shall hold a public hearing after public notice as required by section 4447 of this chapter, prior to the

establishment of any supplementary rules and regulations. Permitted uses may include and shall be limited to:

(A) dwelling units in detached, semidetached, or multi-storied structures, or any combination thereof;

(B) any nonresidential use;

(C) public and private educational facilities; and

(D) industrial uses and buildings.

The zoning regulations may authorize the planning commission or the development review board to allow for a greater concentration of density, of intensity of residential land use, within some section or sections of the development than upon others. The zoning regulations may require that the approval by the planning commission or the development review board of a greater concentration of density or intensity of residential land use for any section to be developed be offset by a lesser concentration in any other section or by an appropriate reservation of common open space on the remaining land by a grant of easement or by covenant to the municipality.

(13) **Access to renewable energy resources.** Any municipality may adopt zoning and subdivision regulations to encourage protection and access to renewable energy resources.

(14) **Time-share projects.**

(A) For purposes of this section a time-share project means a project involving real property containing an interest acquired by means of a time-share estate or a time-share license. A "time-share

estate" is a right to occupy a unit or any of several units during, separated time periods coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof. A "time-share license" means a right to occupy a unit or any of several units during separate time periods, including renewal options, not coupled with a freehold estate or an estate for years.

(B) A municipality may vote to declare projects consisting of five or more time-share estates or licenses to be subject to this chapter, and by so doing is authorized to provide for such projects in the municipal plan and zoning regulations in the same manner as other uses.

(15) **Historic districts and landmarks**.

(A) Zoning regulations may contain provisions for the establishment of historic districts and the designation of historic landmarks. Historic districts shall include structures and areas of historic or architectural significance and may include distinctive design or landscape characteristics, areas and structures with a particular relationship to the historic and cultural values of the surrounding area, and structures whose exterior architectural features bear a significant relationship to the remainder of the structures or to the surrounding area. A report prepared under section 4403(c) of this title with respect to the establishment of an historic district or the designation of an historic landmark should contain an analysis of and recommendations concerning the factors mentioned above that make the district or landmark significant.

(B) With respect to external appearances, and other than normal maintenance, no structure within a designated historic district may be rehabilitated, substantially altered, restored, moved, demolished or changed, and no new structure within an historic district may be erected, without approval of the plans therefor by the planning commission or the development review board. The commission or the board shall consider the following in its review of plans submitted:

(i) the historic or architectural significance of the structure, its distinctive characteristics, and its relationship to the historic significance of the surrounding area;

(ii) the relationship of the proposed changes in the exterior architectural features of the structure to the remainder of the structure and to the surrounding area;

(iii) the general compatibility of the proposed exterior design, arrangement, texture, and materials proposed to be used;

(iv) any other factors including the environmental setting and aesthetic factors which the commission or the board deems to be pertinent.

(C) When a commission or the development review board is reviewing an application relating to an historic district, the following shall apply:

(i) the commission or the board shall be strict in its judgment of plans for those structures deemed to be valuable under subdivision (15)(A) of this section. A commission or a board is not required to limit

new construction, alteration, or repairs to the architectural style of any one period, but may encourage compatible new design;

(ii) ff an application is submitted for the alteration of the exterior appearance of a structure or for the moving or demolition of a structure deemed to be significant under subdivision (15)(A), the commission or the board shall meet with the owner of the structure to devise an economically feasible plan for the preservation of the structure;

(iii) an application shall be approved only when the commission or the board is satisfied that the proposed plan will not materially impair the historic or architectural significance of the structure or surrounding area;

(iv) in the case of a structure deemed to be significant under subdivision (15)(A), the commission or the board may approve the proposed alteration despite subdivision (15)(A)(iii) of this section if:

(I) the structure is a deterrent to a major improvement program which will be of clear and substantial benefit to the municipality; or

(II) retention of the structure would cause undue financial hardship to the owner.

(D) This subdivision, and zoning regulation issued pursuant to it, shall apply to designation of individual landmarks as well as to designation of historic districts. A landmark is any individual building,

structure, or site having by itself a special historic, architectural, or cultural value.

(E) The provisions of this subdivision shall not in any way apply to or affect buildings, structures, or land within the "Capitol complex," as defined in 29 V. S.A. chapter 6.

(16) **Transfer of development rights.**

(A) In order to accomplish the purposes of 10 V.S.A. § 6301, the zoning regulations may contain provisions for the transfer of development rights. The regulations shall:

(i) specify one or more sending areas for which development rights may be acquired;

(ii) specify one or more receiving areas in which those development rights may be used;

(iii) define the amount of the density increase allowable in receiving areas, and the quantity of development rights necessary to obtain those increases;

(iv) define "density increase" in terms of an allowable percentage decrease in lot size or increase in building bulk, lot coverage or ratio of floor area to lot size, or any combination;

(v) define "development rights," which at minimum shall include a conservation easement, created by deed for a specified period of not less than 30 years, granted to the municipality under 10 V. S. A. chapter 155, limiting the land uses in the sending area

solely to specified purposes, but including at a minimum, agriculture and forestry.

(B) Upon approval by the planning commission or the development review board, a zoning permit may be granted for land development based in part upon a density increase, provided:

(i) the area subject to the application is a receiving area, and the density increase is allowed by the provisions relating to transfer of development rights;

(ii) the applicant has obtained development rights from a sending area which are sufficient under the regulations for the density increase sought; and

(iii) the development rights are evidenced by a deed which recites that it is a conveyance under this subdivision and recites the number of acres affected in the sending area; and

(iv) the sending area from which development rights have been severed has been surveyed and suitably monumented.

(C) The municipality shall maintain a map of areas from which development rights have been severed. Following issuance of a zoning permit under this section, the municipality shall:

(i) ensure that the instruments transferring the conservation easements and the development rights are recorded; and

(ii) mark the development rights map showing the area from which development rights have been severed, and indicating the

book and page in the land records where the easement is recorded.

Failure to record an instrument or mark a map does not invalidate a transfer of development rights.

(D) Development fights transferred under this section shall be valid notwithstanding any subsequent failure to file a notice of claim under the marketable record title act.

(17) **Technical review.** A bylaw enacted under this chapter may include procedures to require an applicant to pay for reasonable costs of an independent technical review of the application.

(18) **Moratorium relating to the siting of wireless telecommunications facilities and ancillary improvements.** If a municipality has begun a process to adopt or amend regulations relating to the siting of wireless telecommunications facilities, a municipality may adopt a regulation that establishes a moratorium on issuing permits to allow the siting and construction of wireless telecommunications facilities and ancillary improvements, and, if necessary, that requires that such permits be obtained.

(A) This moratorium may be adopted by vote of the municipality's legislative body, subject to disapproval by the voters under section 1973 of this title, or it may be adopted by vote of a majority of the voters of the municipality present and voting at a duly warned meeting of the voters of the municipality.

(B) A moratorium adopted under this subdivision shall run for no more than 180 consecutive days, covering dates which shall be identified in the

regulation adopting the moratorium, and which shall fall between the effective date of this act and July 1, 1999.

(C) A moratorium adopted under this subdivision shall terminate upon the effective date of new regulatory provisions relating to the siting of wireless telecommunications facilities and ancillary improvements, upon expiration of 180 days from the effective date of the moratorium, or upon June 30, 1999, whichever comes first.

(D) When a moratorium is adopted under this subdivision, any telecommunications facility-related application pending as of the date of the adoption of the moratorium shall be entitled to a permit only when the applicant meets the requirements of the regulations as they exist at the termination of the moratorium.

(19) **Provision for the decommissioning or dismantling of wireless telecommunications facilities and ancillary improvements.** Regulations regarding the decommissioning or dismantling of wireless telecommunications facilities and ancillary improvements may include requirements that bond be posted, or other security acceptable to the legislative body, in order to finance facility decommissioning or dismantling activities.– Amended 1993, No. 232 (Adj. Sess.), § 2, eff. March 15, 1995; 1995, No. 122 (Adj. Sess.), § 3, eff. Apr. 25, 1996; No. 190 (Adj. Sess.), § l(a); 1997, No. 94 (Adj. Sess.), § 4, eff. April 15, 1998.

(2)

No. 99-1880

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

GRAEME FREEMAN, et al.,

Petitioners,

v.

BURLINGTON BROADCASTERS, INC.,
d/b/a WIZN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

JOHN P. CAIN, ESQ.
McCORMICK, FITZPATRICK, KASPER & BURCHARD, P.C.
Counsel of Record
40 George Street
P.O. Box 638
Burlington, VT 05402-0638
(802) 863-3494
Counsel for Respondent Burlington Broadcasters, Inc. d/b/a WIZN

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21PP

QUESTION PRESENTED

The question presented by the Petitioners in the Petition ("Pet.") at i is overly broad, inartfully phrased and not faithful to the proceedings below. The precise question presented for review in this case is:

> Does federal law preempt state and local jurisdiction over radio frequency interference ("RFI")?

CORPORATE DISCLOSURE STATEMENT OF BURLINGTON BROADCASTERS, INC. D/B/A WIZN

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondent Burlington Broadcasters, Inc. d/b/a WIZN ("WIZN") hereby represents that it has not issued shares to the public nor does it have any parent corporation(s).

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. There Is No Compelling Reason For The Court To Grant The Writ.

The Petition presents no issue worthy of this Court's attention and the relief sought should be denied. This case merely follows the well-established proposition that a local or state authority is preempted from regulating RFI because only the Federal Communications Commission (the "FCC") can regulate RFI. Pet. App. A at 2a-3a. This ruling does not conflict with the decision of another United States court of appeals. In fact, all of the circuit courts, all of the district courts, all of the state courts of last resort, and all of the FCC decisions on this issue have unanimously ruled that the FCC has exclusive jurisdiction over RFI. *See* discussion at Section I *infra* and Supreme Court Rule 10(a).

Finding no split of authority on this issue, the Petitioners hurriedly cobble together an argument that the Second Circuit's decision somehow conflicts with the Tenth Amendment and with relevant decisions of this Court concerning preemption. *See* Petition at 5, *et seq*. The Petitioners' desperate claims are for naught. *See* Supreme Court Rule 10(c).

The Second Circuit correctly held that federal law has preempted the field of RFI regulation and that state law is preempted when the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, Pet. App. A at 16a, *quoting, Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947). The Second Circuit's decision on preemption is in full compliance with this Court's precedents and the Tenth Amendment and is unassailable in this appeal. *See* Sup. Ct. Rule 10(c).

Finally, the Petitioners trumpet this case as worthy of certiorari because it is "of significant national importance." Pet. at 5. Such verbal posturing does not make it so. In truth, the issue involved in this case is a fairly pedestrian example of local and state authorities being preempted from acting in a field that is totally occupied by a federal instrumentality, the FCC. The Petitioners' attempts to elevate and change the meaning of this case are unavailing. There is simply no compelling reason for granting the Petition and it must be denied.

I. THE CASES CONCERNING THE FCC'S EXCLUSIVE JURISDICTION OVER RFI ARE NOT IN CONFLICT.

Although the Petitioners labor mightily to twist and bend the precedents in this area, the unalterable fact remains that all of the courts and tribunals that have faced this issue have agreed that the FCC has exclusive jurisdiction over the regulation of RFI. Instead of a split of authority, there is remarkable agreement that state and local authorities are preempted from regulating RFI, as shown in the following cases.

A. United States Court of Appeals.

Three United States courts of appeals have dealt with the precise issue involved in this case. The Second Circuit

decided the case that is the subject of this Petition: *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, 204 F.3d 311 (2d Cir. 2000) (Pet. App. A at 1a) ("For the reasons below, we conclude that federal law has preempted the field of RF interference regulation." Pet. App. A at 16a.) The United States Court of Appeals for the Tenth Circuit decided *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners,* 199 F.3d 1185 (10th Cir. 1999), *cert. denied,* 63 U.S.L.W. 3631 (5/30/2000) (Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field.) Finally, there is *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), *cert. denied,* 511 U.S. 1128 (1994) (The FCC's jurisdiction over technical matters associated with the transmission of radio signals is clearly exclusive. Plaintiffs' action for nuisance against radio station was preempted by the Federal Communications Act.)

All three circuit courts that have faced the issue presented by the Petition have unanimously decided that only the FCC may regulate RFI. There are no conflicts on this issue and no compelling reason for granting this Petition. *See* Supreme Court Rule 10(a).

B. United States District Courts.

This same harmony exists at the district court level. *See Still v. Michaels,* 791 F.Supp. 248 (D.Ariz. 1992) (Federal court lacks subject matter jurisdiction of RFI nuisance case, action is preempted by Federal Communications Act.); *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, CIV-91-6140T (W.D.

N.Y. 1991) (Operators of FCC-licensed transmitters answer only to FCC regarding RFI matters.)

C. State Courts.

State courts have also unanimously decided that only the FCC may regulate RFI.[1] *See, e.g., Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990), *review denied* (1991) (The FCC has exclusive jurisdiction over the resolution of RFI matters. Plaintiffs' action of nuisance is dismissed.); *Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal.App.3d 841, 141 Cal.Rptr. 85, 87 (1977), *appeal dismissed*, 435 U.S. 990 (1978) (Unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, and interference phenomena.); *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984) (To control, regulate, or prohibit radio transmissions of a station licensed by the Federal Communications Commission is beyond the jurisdiction of a state court. *Id.* at 693.); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984) (Gravamen of plaintiffs' complaint is that defendant's signals prevent them from clearly receiving other desired signals. Dismissal of plaintiffs' case affirmed as Congress intended to

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[1] In *Winfield Village Cooperative v. Ruiz*, 537 N.E.2d 331 (Ill. App.), *appeal denied*, 545 N.E.2d 135 (Ill. 1989), an Illinois state court allowed a landlord to maintain an eviction action against a tenant/amateur radio operator who caused RFI. *Winfield Village* is off point since it deals with a breach of contract action in state court rather than the authority of a local zoning board to regulate RFI. That said, *Winfield Village* is wrongly decided and doesn't appear to have been followed by any court.

exercise exclusive jurisdiction over regulatory interference between radio stations.); *Smith v. Calvary Educ. Broadcasting*, 783 S.W.2d 533 (Mo. App. 1990) (Property owners' action against federally licensed radio station for interference of electrical and electronic appliances is preempted by the Federal Communications Act.); *Monfort v. Larson*, 693 N.Y.S.2d 286, 289 (N.Y. App. Div. 1999), *leave to appeal dismissed*, 705 N.Y.S.2d 7 (N.Y. Jan. 6, 2000); *Fetterman v. Green*, 455 Pa.Super. 639, 689 A.2d 289, *appeal denied*, 695 A.2d 786 (June 17, 1997) (The Federal Communications Act has preempted common law claims based upon radio frequency interference, thus divesting state courts of subject matter jurisdiction to entertain their claims.); *cf. Goforth v. Smith*, 991 S.W.2d 579, 583-84 (Ark. 1999) (state law action to remedy environmental effects of RF emissions preempted).

D. Federal Communications Commission.

Finally, the FCC has also ruled on the issue before the Court. *See In re Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (Common Carrier Bureau 1987) (Local zoning regulations are preempted, the Communications Act of 1934 and the Commission's implementing regulations have preempted state and local regulation of the radio frequency interference at issue in this case.); *In re 960 Radio, Inc.*, FCC 85-578 (November 4, 1985), 1985 WL 193883 (1985) (The FCC found that the "federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.")

It should be stressed that the FCC's explicit statement on preemption of local regulation of RFI is dispositive on the issue of implicit intent to preempt. *Graeme Freeman, et al. v. Burlington Broadcasters, Inc. d/b/a WIZN, et al.*, Pet. App. A at 20a-21a, *citing, Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rulemaking, but also when it interprets through adjudication.") (citation omitted).

In sum, the cases in this area belie Petitioners' representation that this issue "is one of first impression for this Court,[2] and is of significant national importance." Pet. at 5. There is virtual unanimity among the federal and state courts that only the FCC may regulate RFI. Far from being a matter of national importance, this case presents a tired rehash of an argument that was put to rest years ago. The Petition should be denied.

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[2] The issue presented in the Petition is also *not* one of first impression for this Court, as represented by Petitioners. Pet. at 5. This Court has twice considered and twice denied petitions for certiorari on the very issue involved in this case. *See Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 63 U.S.L.W. 3631 (5/30/2000); and *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), *cert. denied*, 511 U.S. 1128 (1994).

II. THIS CASE DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The Petitioners seem desperate to concoct an argument that will allow them to better position their Petition for certiorari. This is evident in Petitioners' next claim that the Second Circuit's decision is inconsistent with this Court's preemption standards (Pet. at 6-9) and that the decision is inconsistent with the Tenth Amendment (Pet. at 10-27). Both arguments are woefully weak and easily countered.

A. This Case Is In Accord With This Court's Standards For Preemption.

This Court has indicated that the Supremacy Clause of the Constitution, U.S. Const., art. VI, cl. 2, authorizes the federal government to preempt state laws to the extent necessary to achieve its purposes. *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Congressional intent is the "ultimate touchstone" of preemption analysis. *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

In deciding this case, the Second Circuit recognized that the Federal Communications Act of 1934 ("FCA") does not contain an express intent to preempt state law from regulating RFI. Pet. App. A at 16a. However, the court recognized that the legislative history and the cases in this area show that Congress has authorized the FCC to exercise exclusive jurisdiction over the entire field of regulation of RFI (so-called "field preemption"). The

opinion below scrupulously followed this Court's precedents and determined that federal law has indeed preempted the field of RF interference regulation. Pet. App. A at 16a. The Second Circuit based its conclusion on the FCC's statutory authority to regulate RFI (Pet. App. A at 17a), the FCC's regulation of RFI through rule-making (Pet. App. A at 19a), and the FCC's own administrative decisions on preemption of local regulation of RFI (Pet. App. A at 21a-22a).

The opinion below is correct and thorough and in full accord with the relevant decisions of this Court on preemption of state action.

1. Field Preemption Of RFI Is Total And Includes Business Equipment.

Undaunted by the facts and the unanimous precedent in this area, the Petitioners' argument continues apace. The Petitioners concede that while the FCC may have express authority to regulate RFI to consumer equipment, the FCC has no authority to regulate interference to business and institutional equipment. Pet. at 18, 22. The Petitioners contend that in 1982 the Congress amended the FCA and established minimum electronic standards for home electronic equipment and systems at 47 U.S.C. § 302a(a)(1-2). Congress did not set similar standards for institutional or business equipment. Therefore, the Petitioners state that except with respect to devices which are capable of emitting harmful interference, "business electronic equipment remains untouched by federal law. 47 U.S.C. § 302a." Pet. at 23.

The Petitioners' argument is totally devoid of merit. In 1982, Congress amended the FCA to enable the FCC to regulate devices susceptible to **receiving** RFI. The legislative history of the 1982 amendments shows that Congress decided not to establish technical rules for commercial devices because such devices were generally not susceptible to RFI and did not need to be regulated. However, Congress found that many consumer electronic devices were of inferior quality and the manufacturers were not voluntarily building their equipment to reject RFI. Therefore, Congress broadened the FCC's authority and allowed it to regulate such consumer devices. *See* Communications Amendments Act of 1982, *Joint Explanatory Statement of the Committee of Conference*, 1982 U.S.C.C.A.N. 2261, 1982 WL 25053 (Legis. Hist.) (the "1982 Committee Report") (Pet. App. AA at 191a, *et seq.*)

Even though it decided to regulate only consumer devices, Congress stated the obvious:

> Moreover, by virtue of this section, the conferees wishes [*sic]* to clarify that the exclusive jurisdiction over RFI incidents (including pre-emption of state and local regulation of such phenomena) lies with the FCC.

The 1982 Committee Report, Pet. App. AA at 207a.

The Second Circuit correctly recognized the folly of Petitioners' "business equipment" argument and rejected it. Pet. App. A at 22a.

2. The Cases Confirm That Federal Preemption Of RFI Extends To Business And Institutional Equipment.

The Petitioners seek to bolster their "business equipment" argument by stating that the cases upon which the Second Circuit relied "do not address interference to business and institutional equipment." Pet. at 22. This is an extraordinarily disingenuous statement. The Petitioners are fully aware of several cases relied upon by the Second Circuit which deal with the preemption of local or state regulation over RFI which affects business equipment.

For example, in *Smith v. Calvary Educ. Broadcasting*, 783 S.W.2d 533 (Mo. Ct. App. 1990), property owners brought an action against a federally-licensed radio station alleging interference in the use of "electrical and electronic appliances located in plaintiffs' homes or **businesses**." *Id.* at 533 (emphasis supplied). Since the regulation of RFI is precisely the subject matter which lies within the exclusive regulatory jurisdiction of the FCC, the Missouri Court of Appeals affirmed the trial court's determination that it lacked subject matter jurisdiction over the plaintiffs' claim. *Smith*, 783 S.W.2d at 537.

See also Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691 (Ky. 1984) for another state RFI regulation case concerning business equipment. In *Helm*, the Jefferson County Police Chief brought an action against the defendant seeking injunctive relief for interference with police broadcasts. The Chief claimed defendant's interference with police transmissions placed the life and safety

of his officers in jeopardy, and prevented calls for assistance from being transmitted. *Helm*, 667 S.W.2d at 692.

The lower court dismissed the Chief's case for lack of subject matter jurisdiction because "the state has no authority to exercise jurisdiction" over frequency interference cases. *Helm*, 667 S.W.2d at 692.

On appeal, the Supreme Court of Kentucky affirmed and held:

> To control, regulate, or prohibit radio transmissions of a station licensed by the Federal Communications Commission is beyond the jurisdiction of a state court.

Helm, 667 S.W.2d at 693.

Contrary to the Petitioners' representation, there are a number of judicial decisions in this area which have held that states and local governments are preempted from regulating RFI in any form, including RFI which affects business equipment. The Second Circuit properly decided this case and it is Petitioners' argument, not the decision below, that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c).

B. The Tenth Amendment Does Not Bar Field Preemption.

The Petitioners finally claim that the Second Circuit's decision is somehow inconsistent with the Tenth Amendment to the United States Constitution. Pet. at 10, *et seq.* The Petitioners appear to argue that all types of implied preemption of state control, including field preemption, are banned by the Tenth Amendment. The Petitioners'

rationale for their theory is somewhat cryptic: The Petitioners conclude that the zoning laws of the "small Vermont town of Charlotte are the authority that rules this application," because Congress failed to affirmatively act to preempt state regulation of RFI so the parties "drop into the safety net of the Tenth Amendment." *See* Pet. at 10, 12.

This, of course, has never been the rule of this Court and the substance of Petitioners' Tenth Amendment argument is wrong. Implied federal preemption of state action is widely recognized by this Court. *See, e.g., Printz v. United States*, 521 U.S. 898, 919 (1997) (The Tenth Amendment expressly confirms the residual state sovereignty implicit in "the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. . . . ")

This Court recently reaffirmed the vitality of the field preemption doctrine in *Crosby v. National Foreign Trade Council*, No. 99-474, 2000 WL 775550 (U.S. June 19, 2000):

> A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. **When Congress intends federal law to "occupy the field," state law in that area is preempted.** And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

Crosby v. National Foreign Trade Council, No. 99-474, 2000 WL 775550 (U.S. June 19, 2000) at 6 (citations omitted) (emphasis supplied).

The Petitioners' argument that implied preemption of local regulation of RFI somehow runs afoul of the Tenth Amendment was recently raised and resoundingly rejected in *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 63 U.S.L.W. 3631 (5/30/2000). In *Southwestern Bell*, the County Commissioners also claimed that preemption of RFI violates the Tenth Amendment and federalism principles because zoning and public safety are traditional powers reserved to the states. *See Southwestern Bell*, 199 F.3d at 1193.

The Tenth Circuit in *Southwestern Bell* had little trouble decisively rejecting this Tenth Amendment argument by noting that the Supreme Court has ruled that preemption principles apply even to a matter of special concern to the states. *Id.* at 1194, *quoting*, *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). The *Southwestern* court also stated that RFI regulation is not a traditional local interest, but a national interest preempted by federal legislation. If localities were allowed to have patchwork regulation across the country, the *Southwestern Bell* court reasoned, this would prevent a functional national telecommunications network. Therefore, the court held that federal preemption of RFI regulation does not violate the Tenth Amendment. *See Southwestern Bell, id.* at 1194.

The Petitioners' Tenth Amendment argument is weak, illogical and contrary to this Court's precedents. The Petition must be denied.

CONCLUSION

For all the reasons set forth above, Respondent Burlington Broadcasters, Inc. d/b/a WIZN requests the Court to deny the Petition for a writ of certiorari.

JOHN P. CAIN, ESQ.
McCORMICK, FITZPATRICK,
KASPER & BURCHARD, P.C.
Counsel of Record
40 George Street
P.O. Box 638
Burlington, VT 05402-0638
(802) 863-3494
Counsel for Respondent
Burlington Broadcasters, Inc.
d/b/a WIZN

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No. 99-1880

In The

Supreme Court of the United States

GRAEME FREEMAN, et al.,

Petitioners,

v.

BURLINGTON BROADCASTERS, INC.,
d/b/a WIZN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT NYNEX MOBILE LIMITED PARTNERSHIP 1 d/b/a VERIZON WIRELESS' BRIEF IN OPPOSITION

BRIAN J. SULLIVAN*
DANIEL A. SEFF
BURAK ANDERSON & MELLONI, PLC
30 Main Street, P.O. Box 787
Burlington, Vermont 05402-0787
(802) 862-0500

Counsel for Respondent NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless

**Counsel of Record*

June 23, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Courts below correctly held that Congress has conferred exclusive jurisdiction on the Federal Communications Commission over complaints of radio frequency interference lodged against all transmitting sources.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent, NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless (f/d/b/a Bell Atlantic NYNEX Mobile and Bell Atlantic Mobile), by its attorneys, Burak Anderson & Melloni, PLC, respectfully submits this Corporate Disclosure Statement.

NYNEX Mobile Limited Partnership 1 is a Delaware Limited Partnership of which Cellco Partnership is the Managing General Partner. Cellco Limited Partnership is owned by the following entities: Bell Atlantic Cellular Holdings Limited Partnership, NYNEX PCS, Inc., PCSCO Partnership (each of these three entities is owned by Bell Atlantic Corporation, a publicly-traded company), PCS Nucleus Limited Partnership, JP Partner Company Limited Liability Partnership and Airtouch Paging (each of these entities are owned by Vodaphone Airtouch, PLC of the United Kingdom, a publicly-traded company). It is anticipated that Bell Atlantic Corporation will merge with GTE Corporation, a publicly-traded company, shortly.

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STATEMENT OF THE CASE

On August 11, 1997, the United States District Court for the District of Vermont granted the Motion to Dismiss filed, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), by Respondent, NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless ("Verizon Wireless").[1] *In re Appeal of Graeme and Mary Beth Freeman, et al.*, 975 F.Supp. 570 (D.Vt. 1997). Verizon Wireless based that motion on the exclusive jurisdiction of the Federal Communications Commission ("FCC") over complaints of radio frequency interference ("RFI") lodged against all transmitting sources. Due to this exclusive jurisdiction and because the underlying action solely concerned RFI complaints alleged against such sources, the District Court correctly dismissed that action.

Upon further appeal, the Second Circuit affirmed the District Court's ruling, holding that the FCC's exclusive jurisdiction prevents any state or local authority from taking action based on RFI complaints against any transmitting source. *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (Newman, J.). The Second Circuit also directed the District Court to modify its judgment to reflect the affirmance of the earlier decision of the Charlotte, Vermont Zoning Board of Adjustment (the "ZBA"). *Id.* at 325. That earlier decision also found exclusive FCC jurisdiction over the RFI complaints that are the subject of this action.

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[1] This limited partnership formerly did business as Bell Atlantic NYNEX Mobile and Bell Atlantic Mobile.

REASONS FOR DENYING THE WRIT

The Petitioners ask this Court to ignore the well-established body of law on which the Second Circuit and the District Court relied and, thereby, to abrogate the FCC's long-standing, exclusive jurisdiction over RFI complaints. However, all of the federal appellate courts that have decided this issue have ruled that the FCC's exclusive jurisdiction in this area preempts state and local efforts to regulate RFI. Further, all of the federal district courts and all of the state courts of last resort that have faced this issue have reached the same result. Finally, the administrative decisions rendered by the FCC itself uphold this principle unanimously.

This uniformity stems from clear statements made over a long period of time by this Court and the Congress. Indeed, this Court has consistently held that the FCC has exclusive jurisdiction over the technical areas of broadcasting. *See, e.g., Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n.6 (1963) (contrasting regulation of advertising with "the [FCC's] jurisdiction over technical matters such as a frequency allocation, over which federal control is clearly exclusive"). This jurisdiction stems from the goals and policies evident in the Federal Communications Act of 1934 (the "FCA"). *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (FCA manifests Congress' intent to "maintain . . . a grip on the dynamic aspects of radio transmission").

Congress again expressed its intent with regard to regulation of RFI when it amended the FCA in 1982. In a pointed summary of its purposes in crafting those

amendments, a joint conference committee of the House and Senate stated:

> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the [FCC] over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the [FCC].

H.R. Conf. Rep. No. 97-765, at 33 (1982) (the "Committee Report"), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2277, *quoted in Freeman*, 204 F.3d at 321; Pet. App. 233a. Hence, the legislative history of the provision in question demonstrates Congress' intent to preempt the field of RFI complaints directed at all transmitting sources.

The RFI issues presented by this case stem from a condition imposed by a municipal zoning board purportedly requiring a permit holder to take action to prevent and remedy RFI complaints.[2] The Second Circuit correctly followed the line of cases that have confirmed the FCC's exclusive jurisdiction over such complaints and

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[2] The ZBA found that there was "no credible evidence" that Verizon Wireless is the cause of the RFI alleged by the Petitioners, a finding noted by both the District Court and the Second Circuit. *In re Appeal of Freeman*, 975 F.Supp at 572; *Freeman*, 204 F.3d at 323 n.10.

ruled that the condition at issue is unenforceable. *Freeman*, 204 F.3d at 325 (citing cases). In so doing, that court properly applied the test developed by this Court for field preemption. *Id.* at 320, *citing English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990).

Because of this well-established body of law, the question presented by the Petitioners does not warrant the grant of their Petition. Indeed, the legislative, executive and judicial branches are in complete accord that the issue has been resolved in favor of the FCC's exclusive authority. Neither does this case present an issue of "first impression" in this Court. *Contrast* Pet. 5 *with Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.), *cert. denied*, 511 U.S. 1128 (1994) *and Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3631 (U.S. May 30, 2000). In sum, Petitioners present no compelling reason for this Court to grant the writ that they seek.

I.

CONGRESS HAS DEMONSTRATED ITS INTENT TO CONFER EXCLUSIVE JURISDICTION OVER RFI INCIDENTS ON THE FCC

RFI arises when signal radiation by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes a malfunction of some other electronic device. Committee Report at *5; Pet. App. 202a.[3] In this matter,

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[3] Hence, as an initial matter, RFI is a phenomenon that affects the performance of devices and not a matter of "health

the Petitioners ask this Court to assert jurisdiction over RFI complaints directed at operators of FCC-licensed transmitters. However, the FCC has plenary and exclusive jurisdiction over RFI complaints lodged against all transmitting sources.

A. The Regulatory Regime Created by the FCA Confers Exclusive Jurisdiction over RFI on the FCC

Congress created the FCC with the passage of the FCA. In section 301 of that Act, Congress explicitly stated that its purpose in doing so was: "among other things, to maintain control of the United States over all channels of radio transmission . . . " and that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . . when interference is caused by such use or operation. . . . " 47 U.S.C. § 301. This Court has confirmed that Congress' intent was to create a uniform system of federal regulation over all technical aspects of radio transmission. *Pottsville Broad. Co.*, 309 U.S. at 138.

Subsequently, this Court held that one of Congress' primary reasons for creating the FCC was to eliminate the

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and safety" as the Petitioners imply. Pet. 4; *Freeman*, 204 F.3d at 325. Neither does RFI present issues of visibility or other aesthetic effects. Hence, Petitioners misplace their reliance on the cases that uphold state and local authority over such "traditional bases" of zoning and planning as "preserving the character of the neighborhood" and "avoiding aesthetic blight." Pet. 18-19; *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998).

"confusion and chaos" caused by the rapid increase in the number of radio transmitters and a lack of unified, national control. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212-14 (1943); *see also Head*, 374 U.S. at 430 n.6; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (FCC created to serve as "the single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio") (footnotes and internal quotation marks omitted). This Court has not reached a contrary result.

B. The 1982 Amendments of the FCA Extend the FCC's Exclusive Jurisdiction

In 1982, Congress amended the FCA to expand the FCC's regulatory authority to encompass devices susceptible to receiving RFI. Congress observed that commercial receiving devices were generally not vulnerable to RFI and did not need to be regulated. However, Congress also found that the manufacturers of consumer receiving devices were not voluntarily building their equipment to reject RFI:

> While almost any transmitter of any service is a potential interference source, amateur or citizens band (CB) stations are very often associated with RFI problems involving electronic devices in the home . . . Appropriate rules of the [FCC] require all transmitters of all services, including the transmitting sections of transceivers, to suppress spurious radiation. It has become evident that many interference problems involving home electronic equipment and

> systems are not fully resolvable but that resolution of some interference problems may require action with respect to receivers and other electronic devices picking up unwanted signals.

Committee Report at *11, Pet. App. 202a-203a. In other words, Congress now believed that it should regulate the devices that receive RFI as well as those whose transmissions cause RFI.

In deciding to exercise this regulatory authority, Congress specifically examined the receiving devices that were causing the problem. In unambiguous terms, Congress placed blame on the manufacturers:

> The Conferees wish to emphasize that it was its hope that voluntary efforts by manufacturers to reduce RFI when possible, as opposed to the use of government regulation, would be sufficient.

Id. at *37, Pet. App. 230a. Congress further made clear that not all manufacturers were at fault and drew a sharp distinction between those manufacturing commercial devices (which were adequately protected against RFI) and those manufacturing consumer devices (which were not):

> Devices designed and marketed for use in a commercial environment normally include necessary protection against interference and do not require [FCC] regulation. In the market for home devices, however, good faith industry attempts to solve this interference problem have not always been as successful. Thus, in view of complaints regarding home devices, the conferees believe that [FCC] authority to impose

> appropriate regulations on home electronic equipment and systems is now necessary to insure that consumers' home electronic equipment and systems will not be subject to malfunction due to RFI.

Id. at *37, Pet. App. 230a-231a.

In other words, Congress sought to address the specific problem of RFI complaints stemming from inadequate protection against RFI in consumer devices by expanding the FCC's exclusive jurisdiction to cover those devices. That agency's exclusive authority over transmitters had already existed for nearly 50 years.

C. In the Course of Adopting the 1982 Amendments, Congress Reiterated the FCC's Exclusive and Plenary Jurisdiction Over All RFI Matters

Even as it broadened the FCC's authority in this manner, Congress reemphasized that the FCC retained exclusive jurisdiction over RFI complaints against all transmitting sources:

> [T]he conferees wish to clarify that the exclusive jurisdiction over RFI incidents (including preemption of state and local regulation of such phenomena) lies with the FCC.
>
> . . . .
>
> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the [FCC] over matters involving the RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting

> apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint.

Id. at *15, *39, Pet. App. 207a, 233a. Hence, the distinction urged by the Petitioners – for RFI complaints against transmitters based on interference to consumer devices rather than business devices – has no relevance to this case. The FCC has exclusive jurisdiction over RFI complaints directed at all transmitting sources.[4] Indeed, when confronted with these unambiguous statements of legislative intent at oral argument below, Petitioners conceded that the distinction between consumer and business devices makes no difference. App. 90a-91a.

D. Cases Decided After the 1982 Amendments Uphold the FCC's Exclusive Jurisdiction over RFI

In the intervening years, several courts have held that the FCC continues to have exclusive jurisdiction over all RFI complaints against FCC licensees. *See Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.) (FCC has exclusive jurisdiction over the regulation of RFI), *cert. denied*, 511 U.S. 1128 (1994); *Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185 (10th Cir. 1999) (rejecting contentions that 1996 amendments to FCA alter FCC's exclusive jurisdiction over RFI in context of local land use permit condition), *cert. denied*, 68

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[4] Given the prevalence of personal computers at work, fax machines at home and the like, this distinction would prove extremely difficult to apply in practice. *See Freeman*, 975 F.Supp. at 575 (reference to "computers in the home" and "computers at work").

U.S.L.W. 3631 (U.S. May 30, 2000); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (decision from which Petitioners have sought review); *Great Lakes Wireless Talking Machine Co. d/b/a WZSH 95 FM v. Hayes, et al.*, CIV-91-6140T (W.D.N.Y. June 25, 1991) (operators of FCC-licensed transmitters answer only to FCC regarding RFI matters); *Still v. Michaels*, 791 F.Supp. 248 (D. Ariz. 1992) (all claims that would obstruct FCC's ability to regulate radio frequencies are preempted)[5]; *Blackburn v. Doubleday Broad. Co.*, 353 N.W.2d 550 (Minn. 1984) (subject matter of RFI lies within FCC's exclusive jurisdiction); *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984) (state court lacks jurisdiction to control, regulate or prohibit radio transmissions of an FCC-licensed transmitter that interfered with county police radio communications system – non consumer devices); *Smith v. Cavalry Educational Broad. Network*, 783 S.W.2d 533 (Mo. App. 1990) (FCC has exclusive jurisdiction over

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[5] In *Still*, the district court ruled that federal preemption deprived all courts of subject matter jurisdiction over RFI claims directed at amateur radio operators. *Id.*, 791 F.Supp. at 251-53; *but see Winfield Village Cooperative v. Ruiz*, 537 N.E.2d 331 (Ill. App.) (court allows landlord to maintain eviction action against tenant/amateur radio operator who caused RFI), *appeal denied*, 545 N.E.2d 135 (Ill. 1989). It appears that no court has followed, or even cited *Winfield Village*, other than to distinguish it and limit its holding. *See Southwestern Bell*, 199 F.3d at 1192 (attributing holding of *Winfield Village* to fact that breach of contract action is "private in nature" and does not involve state regulation). Further, the *Winfield Village* court allowed claims of RFI affecting consumer devices to stand, a position that even the Petitioners concede is untenable. *Compare id.*, 537 N.E.2d at 331 (interference with "consumer electronic equipment") *with* Pet. 22.

complaints of RFI to electrical and electronic appliances located in plaintiffs' homes or businesses); *Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990) ("federal regulation of [RFI] matters is exclusive"), *review denied* (Ariz. 1991); *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289 (Pa. Super. Ct.) (upholding federal RFI preemption after enactment of 1996 amendments to FCA), *appeal denied*, 695 A.2d 786 (Pa. 1997); *Monfort v. Larson*, 693 N.Y.S.2d 286, 289 (N.Y. App. Div. 1999) ("radio signal interference at issue *sub judice* falls within the FCC's technical domain"), *leave to appeal dismissed*, 705 N.Y.S.2d 7 (N.Y. 2000); *cf. Goforth v. Smith*, 991 S.W.2d 579 (Ark. 1999) (state law action to remedy environmental effects of RF emissions preempted).

Significantly, the FCC's administrative rulings have reached the same result. *See In the Matter of 960 Radio, Inc.*, 1985 FCC LEXIS 2342, at *78-85 (Oct. 29, 1985) ("federal power in the area of [RFI] is exclusive; to the extent that state or local government attempts to regulate in this area, their regulations are preempted"); *In the Matter of Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987) (the FCA comprehensively regulates RFI and occupies that field); *Southwestern Bell*, 199 F.3d at 1192 (courts defer to FCC decisions that address preemption of local regulation of RFI issues), *citing City of New York v. FCC*, 486 U.S. 57, 64 (1988).

E. The Abrogation of this Body of Law, for which the Petitioners Argue, Would Create an Unworkable Set of Conflicting Regulations

In addition, a core purpose of the FCC would be stymied by allowing each state and locality to formulate

its own technical standards in the complex area of RFI and the resulting imposition of liability on FCC licensees. If such an outcome were allowed, operators of radio transmitters and the public would soon face inconsistent and conflicting technical standards.

Such a regime would pose special difficulties for the operator of a multi-state, wireless communications network such as Verizon Wireless. The provision of a uniform quality of service would be impossible if such service providers faced varying technical regulations in each municipality in which they operated. Indeed, the chaos and confusion that Congress attempted to eliminate when it created the FCC would carry the day.

II.

THE SECOND CIRCUIT CORRECTLY APPLIED THE *CIPOLLONE* FIELD PREEMPTION TEST

Acknowledging that *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), states the applicable test for field preemption, Petitioners nevertheless claim the Second Circuit "failed to apply the test properly." Pet. 8. A brief review of the Second Circuit's field preemption analysis confirms that the Court correctly applied the *Cipollone* test.

Initially, the Second Circuit recognized that congressional intent is the "ultimate touchstone" in preemption analysis. *Freeman*, 204 F.3d at 320, *quoting Cipollone*, 505 U.S. at 516. Having properly laid out the test and guidelines for field preemption, the Second Circuit exhaustively analyzed the applicable statutes, legislative history, FCC regulations and that agency's interpretation

of the scope of preemption. *Freeman*, 204 F.3d at 320-22. That Court then addressed and rejected Petitioners' arguments that federal law authorizes local regulation of RFI. *Id.* at 322-25. After engaging in this comprehensive field preemption analysis, the Second Circuit correctly concluded that:

> [a]llowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in delegating regulatory power to the FCC for uniform regulation of broadcast technologies.

Id. at 325 (internal quotation marks and citations omitted); *accord Southwestern Bell*, 199 F.3d at 1193-94 ("the statutes and legislative history support Congress's intent to occupy the field of RFI issues").

III.

THE TENTH AMENDMENT PRESENTS NO BARRIER TO THE APPLICATION OF FIELD PREEMPTION IN THIS CASE

A. Field Preemption Does Not Violate the Tenth Amendment

Petitioners appear to argue that all types of implied preemption, including field preemption, violate the Tenth Amendment *per se*. *See* Pet. 10, 12 (contending that Congress' alleged failure to "affirmatively act" to preempt state regulation of RFI causes the parties to "drop into the safety net of the Tenth Amendment," and that therefore "the zoning laws of the small Vermont town of Charlotte

are the authority that rules this application"). This Court has never reached such a result, and the decided cases lead to the opposite conclusion. *See Printz v. United States*, 521 U.S. 898, 919 (1997) (the Tenth Amendment expressly confirms the residual state sovereignty implicit in "the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. . . . ").

Indeed, the Tenth Amendment provides only that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., AMEND. 10. This Court has described that Amendment as "essentially a tautology," which merely confirms that "the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

As a corollary, is settled law that:

> [i]n the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."

Cipollone, 505 U.S. at 516 (internal quotation marks and citations omitted). There is nothing incongruous about a system of residual state sovereignty in which federal law can impliedly occupy an entire legislative field. As this Court has explained:

> Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or

> implicitly contained in its structure and purpose." Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because . . . "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982) (citations omitted). Hence, field preemption continues to be a viable doctrine, fully applicable to this case. *See Crosby v. Nat'l Foreign Trade Council*, No. 99-474, 2000 WL 775550, at *6 (U.S. June 19, 2000) ("When Congress intends to occupy the field, state law in that area is preempted.") (citations and internal quotation marks omitted); *see also Southwestern Bell*, 199 F.3d at 1193-94 (rejecting argument that field preemption of RFI violates the Tenth Amendment); *cf. Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (rejecting argument that exclusive jurisdiction of FCC over radio frequency radiation violates the Tenth Amendment).

B. Petitioners Did Not Preserve Their Tenth Amendment Argument Below.

Petitioners' avowal that their constitutional argument was "briefed and argued" to the Second Circuit is incorrect. Pet. 12. Neither of the two fleeting Tenth Amendment references in Petitioners' Second Circuit briefs asserts that the field preemption doctrine is unconstitutional or explains why that Amendment applies to this case. App. 9a, 22a. Further, Petitioners never so much as

mentioned the Tenth Amendment during the Second Circuit oral argument. *Id.* 73a-92a. Petitioners' failure to make the constitutional argument below supplies an ample basis to deny certiorari on the issue. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or involved in the lower court"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.26, at 364 (6th ed. 1986).

CONCLUSION

For all of the foregoing reasons, Respondent, Verizon Wireless respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

BRIAN J. SULLIVAN
Counsel of Record
DANIEL A. SEFF
BURAK ANDERSON & MELLONI, PLC
30 Main Street, P.O. Box 787
Burlington, VT 05402-0787
(802) 862-0500

Attorneys for Respondent
NYNEX Mobile Limited
Partnership 1 d/b/a
Verizon Wireless

APPENDIX

97-9141

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, Willaim Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, Barbara Sanford Farrell, and William Pinney, Sr.

Plaintiffs-Appellants

vs.

Burlington Broadcasters, Inc. dba WIZN, Charlotte Fire & Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

APPELLANTS' BRIEF

Gerald R. Tarrant
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05602-1440
(802) 223-1112

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PRELIMINARY STATEMENT OF UNDERLYING DECISION

Appellants (the Neighbors) seek review of an Opinion and Order of the U.S. District Court for the District of Vermont, dated August 8, 1997 (Order filed August 11, 1997), (Sessions, C.J.) granting Appellee Bell Atlantic NYNEX Mobile's (BANM's) motion to dismiss for lack of subject matter jurisdiction. *Appeal of Graeme*, 975 F.Supp. 570 (D.Vt.1997).[1] The Neighbors opposed the motion on two primary grounds: (1) that Congress had not granted the FCC authority to oversee radio frequency interference (RFI) of business electronic equipment and (2) that the

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[1] This is the way the case is cited by the federal reporter system. It should read, *Appeal of Graeme Freeman et al.*

authority to locate appropriate sites for telecommunications towers is local in nature and these matters are reserved to the states and therefore not preempted by the FCC.[2]

STATEMENT OF THE SUBJECT MATTER AND APPELLATE JURISDICTION

This case raises a claim under the Federal Communications Act of 1934 (as amended), 47 U.S.C. §§ 151-613 (1991 and Supp. 1997). The case began with a ruling of the Charlotte, Vermont Zoning Administrator, which was appealed to the Charlotte Zoning Board of Adjustment and then to the Vermont Environmental Court. Pursuant to 28 U.S.C. §§ 1441(b), Appellees removed the case to the United States District court claiming the federal court had original jurisdiction founded on a claim arising under the Constitution, treaties or laws of the United States. The Neighbors timely filed this appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal raises three principal issues, each of which turns on a question of fact or law.

1. ***No Federal Authority to Regulate.*** In granting the Appellee's motion to dismiss, did the District Court erroneously rule that the local zoning order approving the location of the WIZN tower on the condition that the

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[2] Fraud and deceit, as independent state claims, were raised below and alone justify a denial of the motion to dismiss.

permittee's antenna not cause interference was preempted by the Telecommunications Act of 1934 (as amended)? The Neighbors believe the Act grants the Federal Communications Commission (FCC) no authority over radio frequency interference for *business* electronic equipment. 47 U.S.C. § 302a(a).[3]

2. ***Siting of Telecommunications Towers a Local Matter.*** In granting the Appellee's motion to dismiss, did the District Court erroneously conclude that states and towns have no authority to regulate the location of towers under traditional zoning concepts or to impose reasonable conditions over users and permittees of telecommunications towers to prevent or limit undue RFI over local businesses, schools and institutions? The Neighbors believe that preemption of state or local law cannot be inferred by law in this case and that the power to regulate the location of telecommunications towers is reserved to the state as promised by the Tenth Amendment to the U. S. Constitution.

3. ***Local Enforcement Decision.*** In granting the Appellee's motion to dismiss, did the District Court erroneously conclude that fraud and deceit were not raised below and so have no place in this case? The Neighbors disagree with this conclusion.

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[3] Appellees argued that Appellants have a remedy for their problems with interference through the FCC. As a subset of this argument, Appellants will demonstrate that no relief is available through the FCC. See p. 18 *infra*.

STATEMENT OF THE CASE

I. Procedural Case History

This case arises out of various local permitting decisions allowing the construction and location of a telecommunications tower owned by Charlotte Volunteer Fire & Rescue Service (CVFRS) and used by CVFRS and Burlington Broadcasters, Inc. d/b/a WIZN, and more recently by NYNEX MOBILE LIMITED PARTNERSHIP 1, d/b/a Bell Atlantic NYNEX Mobile.

In 1986 the local zoning authority denied the co-application by WIZN and CVFRS to construct a telecommunications tower on Pease Mountain in the town of Charlotte, Vermont on the grounds that it was not *located* in the commercial zone. The co-applicants reapplied and represented that they corrected the earlier problem by relocating the tower consistent with zoning requirements. Concerns were raised whether the tower would cause interference (RFI) where it was proposed to be located. A representative of the co-applicants stated that there would be no interference and if there was they "would trap it out." Appendix 119. This became a condition of the zoning permit issued January 7, 1987. *Id.*

Interference began almost immediately after WIZN went on the air in 1987. Complaints were made directly to WIZN but few of the complaints were adequately addressed. After the complaints of people in town were not addressed, several residents filed a complaint with the local zoning administrator. After investigating the complaint, the Charlotte Zoning Administrator issued a notice of zoning violation on April 5, 1996 against

CVFRS, the owner of the tower. The notice of violation cited CVFRS, WIZN and BANM for operating and/or permitting the operation of a broadcast facility that "has caused long term and continuous [radio frequency] interference ("RFI") with electrical devices in homes and businesses throughout the town." Appendix 125.

CVRFS, WIZN and BANM filed a timely appeal of the zoning administrator's decision with the Charlotte Zoning Board. Vt. Stat. Ann. tit. 24 § 4464(a) (Supp. 1996). The Neighbors made their appearance as parties to support the zoning administrator's decision. Vt. Stat. Ann. tit. § 4464(b) (Supp. 1996).

After a public hearing, the ZBA on July 11, 1996 ruled "that WIZN has caused continuous and widespread [radio frequency interference] that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property." Nevertheless, the ZBA dismissed the notice of violation because it found that Congress intended to maintain federal jurisdiction over RFI phenomena and that the ZBA was without authority to regulate such interference.

On August 8, 1996, the Neighbors filed a Notice of Appeal of the ZBA decision to the Vermont Environmental Court. Vt. Stat. Ann. tit. § 4470 (Supp. 1996). On September 6, 1996, BANM and WIZN filed a Notice of Removal with the United States District Court for the District of Vermont claiming the district courts had original jurisdiction founded on a claim arising under the Federal Communications Act of 1934 (as amended), 47 U.S.C. § 151 *et seq.*

WIZN then filed a motion to dismiss with the U. S. District Court pursuant to Fed.R.Civ.P. 12(b)(6), and BANM filed a similar motion pursuant to Fed.R.Civ.P. 12 (b)(1) and 12(b)(6). Both motions essentially claimed that the Federal Communications Act preempts the Neighbors' zoning appeal. CVRFRS joined in both motions. After briefing and oral argument, the District Court granted BANM's motion to dismiss on the grounds of subject matter jurisdiction. WIZN's Motion to Dismiss was denied as moot.

The Neighbors filed this appeal on September 8, 1997.

II. Statement of Facts

The Neighbors are residents of the Town of Charlotte, Vermont, a small town approximately 12 miles south of Burlington, Vermont of about 3,200 people. They have experienced severe and continuing radio frequency interference of home and business equipment for the past ten years. This interference adversely affects their businesses, church and school. Their story began approximately twelve years ago.

In late 1986, WIZN, a commercial broadcaster operating an FM radio station under a license from the Federal Communications Commission ("FCC") and CVFRS jointly applied to the Town of Charlotte for a zoning permit to construct a 199 foot radio transmission tower on Pease Mountain. Initially, the Zoning Board denied WIZN's application because it was located outside the commercial area. Appendix 119. Following the initial denial, WIZN filed a new application.

The ZBA considered WIZN's second request for a permit at a public hearing on December 23, 1986. At the hearing, concerns were raised about interference to the community from the proposed WIZN tower. WIZN's representative, Michael Calhoun, addressed these concerns by stating to the ZBA, "[T]here will not be any interference and if there is, WIZN will trap it out." *Id.*

Based on the representations made by WIZN, the ZBA orally granted WIZN and CVFRS conditional use approval to construct the communications tower, subject to certain conditions. On December 24, 1986, the Zoning Administrator issued Zoning Permit No. 86-136-JO, listing WIZN as lessee of Henry and Marion Lane's property. The minutes state that "any other antennas authorized in Charlotte – the last one in does an intermodulation study and solves problems, if any." *Id.*

On January 7, 1987, the ZBA issued its Findings of Fact and Decision granting conditional use approval. Appendix 121. The Findings specifically found that any interference with reception because WIZN began broadcasting "will be remedied by WIZN." WIZN did not appeal the permit.[4]

Following the issuance of the permit, WIZN constructed the tower. Immediately thereafter, WIZN conveyed tower ownership to CVFRS. WIZN then signed a twenty-year lease agreement with CVFRS. On or about

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[4] Under Vermont law, the failure to appeal a decision of the ZBA binds all parties to the decision and prohibits them from raising such issues in subsequent cases. Vt. Stat. Ann. tit. § 4472(a) (Supp. 1996); *Town of Charlotte v. Richmond*, 158 Vt. 354, 356, 609 A.2d 638, 639 (1992).

April 17, 1987, WIZN began broadcasting from the tower. Interference within the town was noticed almost immediately and complaints were made to WIZN.

On October 16, 1991, the ZBA held a hearing on a proposal by CVFRS and Contel Cellular of Vermont (BANM's predecessor) to construct four whip antennas on the CVFRS/WIZN tower. During the hearing, members of the ZBA inquired as to whether Contel's proposal would create interference. In response to these inquiries, a representative of Contel Cellular, Charles Cannata, stated that "there would be none." Appendix 124. The permit was orally granted, subject to certain conditions. Mr. Cannata's assurances that there would be no interference was reflected in the October 28, 1991, Findings of Fact and Notice of Decision (Finding No. 4) issued by the ZBA. *Id.* Contel did not appeal the permit or its conditions.

Contel Cellular failed to conduct an intermodulation study following its construction of the four whip antennas as required by the underlying zoning permit approved in 1986.[5]

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[5] An intermodulation study is a condition of the January 7, 1987 zoning permit, paragraph 7. Appendix 121. "Intermodulation" is also known as "cross-talk," and it occurs "where dual broadcasts and harmonics are produced from one frequency interacting with another." Dwight H. Merriam, "Dealing with Locally Unwanted Land Uses (LULUS): Wireless Communications Facilities, 'Super' Service Stations, 'Satellite' Fast Food Restaurants, etc.," American Law Institute (1991), 124.

On April 5, 1996, after receiving complaints from residents and businesses that the co-permittees' had failed to comply with their permit conditions, the Zoning Administrator issued a Notice of Zoning Violation to Henry Lane, CVFRS, WIZN and BANM directing the parties to discontinue the violation and take the appropriate remedial action. Appendix 125-27. The Notice of Violation cited the continuous and widespread problems experienced in "homes and businesses throughout the town" caused by interference from transmissions from the tower.

On April 18, 1996, WIZN appealed the Notice of Zoning of Violation to the ZBA. Soon thereafter, BANM, CVFRS, and the Lane family joined in the appeal.

Immediately after the appeal was taken but prior to the public hearings, BANM and WIZN filed memoranda with the town explaining their right to file civil claims for attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988. See BANM Supplemental Memorandum (5/21/96), 8; WIZN Memorandum of Law (5/22/96), 10-11. Attachments A & B.

At public hearings conducted on May 22, 28, and 29, 1996, the ZBA heard extensive testimony from Charlotte residents, doctors, church officials, and school administrators regarding the pervasiveness of the interference problem. Several members of the local business community testified. For example, Dr. Frank Ittleman, Chief of Staff of the Cardiolothoracic Unit at Fletcher Allen Health Care, in Burlington, Vermont, a Charlotte resident, stated that he experiences difficulties while dealing with patients due to WIZN broadcasting from the tower. Dr.

Ittleman is consistently interrupted by WIZN radio broadcasting while speaking on the telephone with patients. Appendix 192-93. Pastor Mark Bolles of the Charlotte Congregational Church testified that WIZN could be heard over the public address system and through head-sets worn by hearing-impaired parishioners during Sunday services. Appendix 128. Holly Fournier of Mutual Fund Strategist, Ltd. stated that she experiences interference in her home, as well as in her business electronic equipment such as business computers, telephones, telephone systems, televisions and a postage meter. Appendix 130.

Guy Alderdice, Technology Coordinator for Charlotte Central School, testified during the hearings. Mr. Alderdice stated that the Town had invested over $400,000 in computers, cable television, and other technology for the school. This equipment continuously malfunctioned, consumed teachers' time, and most notably, affected students' learning. The school was incurring on-going additional expenses for equipment and repairs due to interference with their equipment. Appendix 132.

Dr. Denise Kessler, D.V.M., owner of a local veterinary clinic, testified that interference from the tower renders the clinic's Audio Patient Monitor useless. Dr. Kessler stated that "[t]he audio from WIZN is sometimes as loud as the patient heartbeat during anesthesia" resulting in "increased expenses as it is necessary for an assistant to monitor the patient's heartbeat when the Audio Patient Monitor is unusable." Appendix 133.

Frederic Lowen stated in his affidavit that "interference problems acted as a thorn in my side for many years

and contributed to my decision to close Vermont Custom Heating, Inc. in September 1996." Appendix 135.

Mary Beth Freeman stated in her affidavit that she was unable to conduct her consulting business due to interference with her equipment. Appendix 202.

In response to these and other complaints, WIZN admitted that it had received approximately 26 complaints during its first two years of operation and a limited number of additional complaints until 1995. Appendix 140.

During the course of the zoning board hearings a group of Charlotte citizens presented the ZBA with copies of questionnaires distributed to local residents and businesses during a recent survey. Eighty-eight respondents indicated that they experienced interference problems in their home or business.[6]

During the hearings, the ZBA also heard from a variety of experts. First, David Groth, WIZN's technical consultant, presented his report entitled: "Engineering Report, WIZN-FM Site, Pease Mountain, Interference Study and Recommendations," May 10, 1996. Appendix 204-7. Fred Lavenberg, WIZN's Chief Engineer, testified that the general interference is being caused by WIZN based on hearing or detecting WIZN music. Lavenberg was unable to identify the cause of the interference where WIZN audio was not heard.

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[6] The Town of Charlotte is a rural community comprising about 3,200 residents in an area of about 36 square miles.

Finally, Mark Hutchins, Broadcast Engineer, testified on behalf of the residents that WIZN's operations at the Pease Mountain site cause interference. Hutchins testified that WIZN knew or should have known in 1986 that its operations at this site would cause significant interference with residents, businesses, and institutions within the Town of Charlotte. He testified WIZN knew or should have known in 1986 that the interference could not easily be corrected and in many instances was not correctable without moving its antenna or significantly reducing the power. Hutchins testified that the addition of CVFRS' and BANM's operations on the tower could only have exacerbated the emission and interference problems. Appendix 146-47. He also identified sections of the FCC rules that expressly decline to preempt state and local authority over RF exposure matters or health and safety matters. Appendix 199, 200.

On July 11, 1996, the ZBA issued a Notice of Decision concluding that despite the reported interference causing "continuous and widespread RFI that has impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of th homes and property," the ZBA lacked jurisdiction to regulate such interference. Appendix 137-45. The Neighbors appealed the Notice of Decision to the Vermont Environmental Court. WIZN, BANM, CVFRS, and the Lane family removed the appeal to the District Court. WEN filed a motion to dismiss under Fed.R.Civ. P. 12(b)(6). BANM

filed a similar motion citing Fed.R.Civ.P. 12(b)(1)[7] and 12(b)(6).

ARGUMENT

I. Introduction

The District Court ruled in favor of BANM's motion to dismiss. It found federal preemption over local authority to regulate the location of telecommunications towers conditioned on the elimination of interference through zoning. Although the Court found no express preemption of local authority over the regulation of business electronic equipment, it found preemption by inference. Where "technical and engineering impediments" are involved in radio transmissions, the Court found the FCC enjoys exclusive authority. Appendix 350-51.

The Court also concluded that the actions of Charlotte town officials did not constitute decisions "regarding the placement, construction, and modification of wireless facilities," ruling out local jurisdiction as provided in 47 U.S.C. § 332(c)(7). It held that the offenses the local authorities reviewed were exclusively related to RFI, which is preempted. Appendix 354-55. Such complaints

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[7] BANM moved to dismiss action pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. In its September 6,, 1996 Notice of Removal, BANM asserted that the District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. Section 1331 states: "the district courts shall have original jurisdiction of all civil actions arising out of the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It is absurd that BANM then turned around and argued successfully that the federal court lacks subject matter jurisdiction.

as the Neighbors have here ought to be raised before the FCC, according to the Court, not in a local zoning forum. Appendix 359.

The Neighbors respectfully disagree with each of these conclusions of law, based on the statutory authority granted by Congress to the FCC. They have found no case supporting preemption of local authority to regulate the siting of towers for purposes of business electronic equipment. The Neighbors suggest that Congress never intended to preempt local zoning decisions on the placement of towers. This is shown through the plain meaning of Congressional enactments, particularly the 1982 amendments to the Act, which demonstrate how the FCC's authority is limited to regulations affecting interference with home electronic equipment, and not business electronic equipment. Should there be any ambiguity or confusion, the Congressional Record explicitly describes how the FCC has chosen not to regulate.

The Neighbors also suggest that a decision on the location of a tower is preeminently appropriate for local authorities to make. *A. T. & T. Wireless v. Virginia Beach, et al.*, Nos. 97-2389, 97-2513, 1998 WL 553666 (4th Cir., Va.). Such a decision does not require a working knowledge of technical or engineering esoteria, but is rather no different from the usual review that such officials make with any application for development.

II. Standard of Review

Appeals from District Court decisions on motions to dismiss are de novo. *Moccio v. New York State Office of*

Court Admin., 95 F.3d 195, 197 (2d Cir.1996). The applicable standard for this Court is the same as that employed by the District Court. On a motion to dismiss a complaint, the court simply determines its legal viability. *Samuels v. Air Transport Local 504*, 992 F.2d 12 (2nd Cir. 1993); *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir.1980). On such a motion only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991), *cert. denied*, 503 U.S. 960 (1992); *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir.1989). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

When reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court must read the complaint with "great generosity." *Yoder v. Orthomolecular Nutrition Institute. Inc.*, 751 F.2d 555, 558 (2d Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). The Court must take all plaintiffs (i.e. the Neighbors in this appeal) allegations as true, construe the complaint in the light most favorable to the plaintiff, and must draw all inferences in plaintiffs favor. *Cosmas v. Hasset*, 866 F.2d at 11; *Yoder*, 751 F.2d at 562.

In addition, there is a general presumption against federal preemption of state law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The party claiming preemption has the burden of proof. *United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990)

A. The Tenth Amendment Reserves Powers to the States. The Tenth Amendment guarantees that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is in a way an underscoring of the Supremacy Clause, which holds, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI. State laws that interfere with or are contrary to the laws of Congress are invalidated by this clause. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 513, 496 A.2d 151, 153, *aff'd*, *Presseault v. I.C.C.*, 494 U.S. 1 (1990).

B. Preemption Is Not Applicable. The District Court relied upon the *Cipillone* case to conclude that federal law preempts the regulatory powers of state and local governments over interference affecting business electronic equipment. *Cipillone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). *Cipillone* recognized three ways federal law can preempt local law: (1) expressly, as when the federal law says it preempts state or local law on the subject; (2) if the state or local law actually conflicts with federal law; or (3) when federal law so preoccupies a legislative field that no room is left for the states to supplement it. 505 U.S. at 516.

C. Field Preemption Is Not Applicable. The District Court concluded that the federal law in the present case is governed by field preemption. The Court found

legislative intent to provide the FCC with exclusive jurisdiction over RFI in the 1982 amendments to 47 U.S.C. § 302a. The District Count concluded, "Section 302a does not, expressly or by implication, authorize state or local regulation of the source of radio frequency interference." Appendix 353.

This is error. Federal legislation does not have to authorize state or local regulation; state or local regulation is allowed if federal regulation is silent. "All is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). Surrender occurs through the actions of Congress. The power originally resides with the states, and needs to be taken away by Congress.

> [T]here is no phrase in the [U. S. Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly" and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, which the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

McCullough v. State of Maryland, 4 Wheat. 406, 4 L.Ed. 579 (1819).

D. There Is A Presumption Against Preemption.

The power of local governments to regulate land use is admittedly not unlimited. "Under the Supremacy Clause of the United States Constitution, where the Congress *has enacted a statute* which preempts a state or local law, the state or local government is without the authority to act within that area." (Emphasis added.) *See Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Haves, et al.*, No. 91-6140T, Slip op. at 6 (citing *Securities Industry Association v. Connolly*, 883 F.2d 1114, 1117 (1st Cir. 1989)), *cert. denied*, 110 S. Ct. 2559 (1990)). The general rule, however, is that there is a presumption *against* federal preemption of state law.

In *Cipollone*, the Supreme Court reaffirmed the presumption against federal preemption of state law. *See also, Broyde v. Gotham Tower, Inc.*, 13 F. 3d at 997. The rule in *Cipollone* is clear: Congress' enactment of provisions in legislation explicitly defining the preemptive reach of the statute means that "matters beyond that reach are not preempted." *Cipollone*, 505 U.S. at 517, 112 S. Ct. at 2618; *Broyde*, 13 F.3d at 997 (relying on the principle of *expressio unius est exclusio alterius).* See also *Keene Co. v. United States*, 508 U.S. 200, 212 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

E. Clear Statement/Plain Meaning Rule Applies. The clear statement rule also applies here. Statutory language is read narrowly by the court when the Commerce Clause is involved to determine whether Congress

intended to preempt the states. Laurence H. Tribe, *American Constitutional Law* (1988), § 5-8. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). As Professor Tribe explains the clear statement rule, "Congress must be prevented from resorting to ambiguity as a cloak to accommodate the competing interests bearing on the federal-state balance." *Id.*

When a statute is clear, there is no need to look beyond the statutory language to divine Congressional intent. *Goodstein v. Bombardier Capital Inc.*, 889 F. Supp. 760, 765 (1995); *United States v. Am. Trucking Assn. Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute that the words by which the legislature undertook to give expression to its wishes.") This is especially true when evaluating a preemption claim since preemption is not presumed. *Cipollone*, supra, 505 U.S. 504, 511 (1992).

The question of whether a particular regulatory field has been preempted by Congress turns on the purpose of the federal regulation or statute. In siting a nuclear waste facility, for example, the State of California decided to create a regulatory system to determine whether the location was economically feasible. The utility challenged the California act on grounds of preemption, and the U. S. Supreme Court determined that there was authority for the state to act, principally because its concerns were local (in this case, economic), while the concerns of the federal nuclear regulatory authority were principally related to safety, which is appropriately preempted. *Pacific Gas and Electric Company*, 461 U.S. 190 (1983);

Dalton v. Little Rock Planning Services, 516 U.S. 474 (1996) ("In a pre-emption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law," citing *Pacific Gas and Electric*, 461 U.S. at 204).

Petitioners in Pacific Gas and Electric argued that the siting of nuclear waste facilities was preempted by federal law, but the Supreme Court concluded otherwise. It held that California could say "no" to a developer of a facility without offending the federal interest in ensuring that the nuclear waste facility was safe, because the purposes of the two regulatory approaches (state and federal) did not overlap, in the same way as Charlotte ZBA and the FCC each pursue different objectives. The roles are just reversed in the present case. In our case, the federal law seeks to ensure economic advantages for broadcasters, by seeking to prevent interference of signals between stations competing for the same airspace or through the regulation of home electronic standards, while Charlotte ZBA is responsible for ensuring that all development is safe, from sources that include the damaging impact of RFI on the quality of life, in this instance on business, church or school, in part through siting decisions. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, FCC 93-142, 58 FR 19393 (1993), Appendix 199, paragraphs 164, 166. There is no overlap here; indeed, there are no regulations purporting to cover business equipment by the FCC.

In a pre-emption case such as this, state law is displaced only "to the extent that it actually conflicts with federal law." *Id.*, 461 U.S. at 204. *See English v. General Electric Co.*, 496 U.S. 72, 84 (1990) (*citing Pacific Gas & Elec.*

Co. supra, 461 U.S. 190, 212-213 (1983)) (a state tort claim brought by an employee of a nuclear-fuels production facility against her employer was not pre-empted by a federal whistle-blower provision because the state law did not have a "direct and substantial effect" on the federal scheme). "[T]he rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

III. The FCC is Not Authorized to Regulate Business Electronic Equipment.

When a rock and roll radio station's broadcasts must be heard in church, because the broadcast overpowers the amplification system; when business computers, telephones and fax machines fail to work properly; when physicians cannot talk with their patients due to the din of a superstation; when school computers and telephones continuously malfunction; it is a local problem that requires a local solution.

Radio frequency interference is a byproduct of radio-frequency radiation. The placement of the source is the key to the direction and intensity of radio-frequency radiation and interference. Who regulates that placement is the underlying question in this case. The Neighbors believe no federal law prevents local regulation of the placement of these towers. It is not a technical or complicated subject. The science is generally available, and the people of a community have a right to plan and regulate local land use through reasonable zoning regulations and conditions.

The District Court accepted the arguments of WIZN, BANM, and CVFRS that federal law preempts the authority of state and local governments to regulate RFI. The Court's reasoning rests on the conclusion that the FCC has exclusive jurisdiction over the regulation of all types of RFI. The District Court also found that residents, businesses, school and church can lodge complaints with the FCC and that the FCC will resolve blanketing interference problems. This too is wrong. The FCC rules do not cover these matters. Cases upon which the District Court relies are based on either a town's attempt to regulate radio stations or a town's attempt to regulate "home electronic equipment or systems" under 47 U.S.C. § 302a(a)(2). They do not address interference of business and institutional equipment. Congress has explicitly made the determination that the FCC does not regulate such matters.

A. The Plain Meaning Demonstrates the FCC is Without Authority. The plain meaning and legislative history of section 302 of the Communications Act of 1934 (the "Act"), clearly shows that Congress' intent was only to regulate interference to "home electronic equipment" and interference between broadcast stations, not interference to business, office, institutional or medical equipment. State and local governments can regulate in these areas.[8]

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[8] WIZN and BANM need only locate a site which does not materially affect the Town and its citizens. Presumably, other locations exist. They should find such a location, obtain appropriate permits and conduct their business properly. There is nothing limiting their ability to do so.

In 1982, Congress amended the Communications Act of 1934 and established minimum electronic standards for "home electronic equipment and systems." Section 302a ("Devices which interfere with radio reception") provides in relevant part:

> (a) The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations
>
> (1) governing the interference potential of *devices* which in their operation are capable of *emitting radio frequency energy* by radiation, conduction, or other means *in sufficient degree to cause harmful interference to radio communications*; and,
>
> (2) establishing minimum performance standards for *home electronic equipment* and standards to reduce their susceptibility to interference from radio frequency energy.

47 U.S.C. § 302a(a)(1-2) (emphasis added). The plain language of section 302a(a) clearly limits federal regulation to devices which could in their operation "cause harmful interference to radio communications" of RFI and to "home electronic equipment." *Id.*(compare section 392a(a)(1) (dealing with interference potential of "devices" which could in their operation "cause harmful interference to radio communications") (emphasis added); and, section 302a(a)(2) (relating only to performance standards for "home electronic equipment" to protect it "from radio frequency energy").

Where Congress intended regulation over interference from radio frequency energy, it has known how to say so. Congress selected areas it felt were necessary to be regulated. See *Keene Co. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statutes but omits it in another . . . it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion."). *A.T.&T. Wireless v. Virginia Beach, supra*, at 6.

In this case, Congress was concerned with *all* devices that might interfere with radio communications. Subsection (1) is clear in this respect. However, in terms of radio communications interfering with electronic devices, Congress limited the FCC's authority to "home electronic equipment." This is clear in subsection (2). It is restrictive in its delegation.

B. Legislative History Proves No FCC Authority.

The plain meaning appears to answer the question clearly and succinctly, but in case this Court concludes there is some ambiguity and wants to look behind the veil of language into legislative history, there is ample evidence supporting the Neighbors' position that no preemption of business electronic equipment was intended. The legislative history shows that Congress did not intend the FCC to have exclusive control over all types of RFI. The Conferees Report cited in *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, No. 91-610T (W.D.N.Y. 1991) and *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994), ends debate on the issue. Appendix 158. Congress *only* authorized the

FCC to regulate "home electronic equipment." Congress went to great lengths to distinguish the FCC's authority over home electronic equipment as opposed to business electronic equipment.[9] The Conferees Report states in pertinent part:

> The Conferees intend that the Commission's authority apply only to "home electronic equipment and systems" likely to be found in the private residence and intended for residential use, as distinguished from devices intended for office and business use.

U.S. Code Cong. & Admin. News, 97th Cong. 2nd (1982), 2237, 2276. Appendix 194, 195. Congress did not intend federal regulation in the form of performance standards for business or institutional equipment. The District Court's partial recitation of the Conferee's Report is not helpful to its analysis when the section on interference is read as a whole. Appendix 353.

The District Court cites a number of cases for the proposition that Congress intended to preempt "all aspects of RFI." Appendix 356-58. In fact, a brief review of the facts of these cases shows that they only dealt with "home electronic equipment" or interference between broadcasting stations.[10]

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[9] This explains why the FCC has not attempted to promulgate rules addressing business electronic equipment.

[10] *See e.g., In the Matter of Mobilcomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987) (holding Town of Wilton, CTs regulation of interference between FM radio signals is preempted); *In the Matter of 960 Radio, Inc.*, 1985 FCC Lexis 2342 (FCC 85-78) (October 29, 1985) (holding a Klamath Falls, Oregon's

Appellees have previously argued that there are three cases which allegedly support their propositions. In *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky 1984), the Jefferson County Police Dept. filed suit against Louisville Two-Way Radio Corp., a commercial system seeking injunctive relief from interference with police broadcasts. *Helm*, 667 S.W.2d. at 691 (emphasis added). The Police Department's claim against Two-Way Radio

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conditional use permit regulating interference between existing FM and TV stations void due to preemption); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W. 2d 550 (Minn. 1984) (holding FCC has exclusive jurisdiction to regulate interference between radio stations); *Great Lakes Wireless Talking Machine Company d/b/a WZSH 95 FM v. David Hayes, et al.*, No. 91-61OT (W.D.N.Y. 1991) (regulation of "home electronic equipment" is preempted; *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994) (same), and *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963) (the Court points to this decision as precedent the FCC has jurisdiction "over technical matters." Opinion at 11). That decision found that "State regulation based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Head* at 428. The footnote referenced by the Court in its opinion discussed technical matters "such as a frequency allocation, . . . " under 47 U.S.C. § 301. That section explicitly authorizes the FCC to "maintain the control . . . over all the channels of radio transmission;. . . . " It has nothing to do with the proper siting of a facility under zoning laws to limit interference within a town. The neighbors agree that technical matters dealing with frequency allocations and broadcast spectrums are complex, technical matters which are regulated by the FCC. Decisions relating to whether 50,000 watt broadcast antenna will cause significant interference of office equipment in a particular location can hardly be confused with frequency allocations or oversight of interference between broadcast stations.

alleged that the "entire radio communication system of the Jefferson County Police Department was interrupted for a period in excess of one hour due to wrongful interference by Two-Way." Id. at 692. The *Helm* case deals with interference between stations, i.e., a commercial station and police broadcasts, not business equipment. The court in *Helm* never addressed the central issue raised in the instant case. It found the plaintiff provided no support for his claims. *Helm* offers no judicial guidance.

In *Smith v. Calvary Educational Broadcasting Network*, 783 S.W. 2d 533 (Mo. App. 1990), the Missouri Court of Appeals, Southern District, Division Two, relying on *Blackburn v. Doubleday*, 353 N.W.2d 550, *supra*, held that it lacked subject matter jurisdiction over plaintiffs' nuisance claim because the authority to regulate RFI lies exclusively with the FCC. *Smith*, 783 S.W. 2d at 537. The Missouri lower court's opinion in *Smith* is the only opinion among all jurisdictions that even alludes to interference with "business appliances." See *Smith*, 533 S.W. 2d at 533. That is all the Court says about the subject. Nowhere does it address the central issue raised by the Neighbors in this case.

The gravamen of the plaintiffs' complaint in *Smith* was that the operation of radio station KOKS "cause[d] interference in the use by plaintiffs of electrical and electronic appliances located in plaintiffs' homes or businesses." Plaintiffs sought relief based on Missouri's common law doctrine of peaceful enjoyment. *Id.*

In dismissing plaintiffs' complaint, the Missouri lower court stated:

> *Blackburn* is the only case cited by the parties or found by the independent research of this court which addresses the issue of whether a state court has jurisdiction to enjoin the transmission of radio signals licensed by the FCC or to order a reduction in the operating power of such transmission.

Id. at 534.

None of the parties in *Smith* nor the *Smith* court itself discovered any of the cases cited by BANM, WIZN or the Neighbors. Thus, with no other precedent to refer to, the court became convinced by the *Blackburn* rationale, and dismissed plaintiffs' complaint.

The *Smith* court failed to recognize the distinction between "home electronic equipment" and "business equipment." In fact, it did not even discuss the distinction under the statute or the legislative history. Moreover, it wrongfully applied the rule from *Blackburn* which dealt with interference between radio stations, not interference to business equipment. Therefore, *Smith* has little, if any, precedential value here. BANM and WIZN's reliance on *Smith* as the sole case addressing RFI to "business appliances" is unfounded.

The third case offered as precedent by the Appellees in prior proceedings is *Fetterman v. Green, et al.*, 689 A.2d 289 (Pa. Sup. Ct. Feb. 4, 1997). But *Fetterman* is a case involving the interpretation of 47 U.S.C. § 333 (malicious interference with transmission) in which two radio frequency licensees (who were business competitors) collided with each other over the use of a particular channel. The Pennsylvania Court explained that if it asserted jurisdiction, "This would entail a state court deliberating over

exactly those types of technical matters which the Supreme Court itself has held to be outside the purview of our jurisdiction." 689 A.2d at 293.

The Neighbors do not dispute that the telecommunications law partially preempts state and local authority, but the preemption is limited to conflicts among licensees and conflicts involving home electronic equipment, as explained above. Business electronic equipment remains untouched by federal law. It is reserved to the states.

The latest case interpreting the authority of the FCC in relation to municipal regulation is *AT&T Wireless PCS Inc. v. City Council of the City of Virginia Beach, supra.* There the City Council denied appellees' application to erect a telecommunications tower;[11] the District Court ordered the Council to approve the tower; and the Fourth Circuit reversed, finding no violation of the Act. In explaining its decision, the Court wrote, "the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result." Decision at 4. Local regulation would not conflict with the purposes of the Act, according to the Court; "our reading simultaneously furthers the Act's explicit goals of facilitating competition, by strengthening the hand of new market entrants who cannot show that they have been unreasonably discriminated against, and

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[11] The *AT&T Wireless* case involved a cellular tower or a "personal wireless facility, as opposed to a broadcast facility like WIZN.

of preserving a large portion of local authority by maintaining that authority in particular cases." Decision at 5. The Act was never designed to destroy local authority to regulate towers, according to the Court, only to ensure that the review was fair and compatible with the purposes of the Act.

Just as in *A.T & T. Wireless*, the interference concern is a local neighborhood issue. It is a siting issue. A court's traditional discomfort with technical matters is not involved here, because no technical issues are involved. The issue is basic to zoning: where should something offensive best be placed. Charlotte thought it had the answer, when the applicants promised to cure any problems that arose. The zoning board agreed, but attached a reasonable condition. Now, when they are to be held to account for their promises, they claim preemption as a shield.

The plain meaning and legislative history of section 302a together with the case law show that Congress intended, and the courts have found, federal preemption only of local regulation of interference to home electronic equipment and between licensees, not of business and institutional equipment.

IV. The ZBA Has Authority to Regulate Questions of Siting.

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182

(1981). Local governments may exercise their regulatory power to institute zoning, when zoning reasonably relates to public health, safety, morals or welfare. *State v. Sanguinetti*, 141 Vt. 349, 351, 449 A.2d 922, 923 (1982). States may legislate on subjects relating to health, life and safety though the legislation may indirectly affect the commerce of the country. *Head*, 374 U.S. at 428, *supra*. Traditional bases of zoning regulation preserving the character of the neighborhood and avoiding aesthetic blight have been upheld by the Fourth Circuit. *AT & T Wireless, supra*.

A. The 1996 Amendments.

The 1996 amendments to the Federal Communications Act of 1934 provide compelling evidence of ZBA authority to regulate siting decisions. Section 107(a)(7) of the House bill, H. 1555 (1996), included preemption language stating that the FCC should adopt guidelines regulating the placement, construction, modification, or operation of facilities of commercial mobile services. H. 1555 as of May 3, 1995, Section 704(a)(7). Appendix 189. These preemption provisions were removed from the final version of the Act. As the U.S. Supreme Court has stated when divining congressional intent, "we are mindful that Congress had before it but failed to pass, just such a scheme." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 526, 126 L.Ed.2d 524 (1983). Therefore, Congress clearly intended state and local governments to continue to control in this area as they have always done.

According to section 704 (1996), as long as state and local controls of "personal wireless service facilities" remain within the enumerated limitations, there is no federal preemption of state and local authority, except for health matters.[12] Appendix 196.

State and local government are the governments directly responsible for the health, safety and welfare of their residents. Narrowing their authority will significantly impair these governments' ability to function in ways essential to their existence. *Commercial Mortg. Ins. Inc. v. Citizens Nat. Bank of Dallas*, D.C. Tex., 526 F.Supp. 510, 523 (1981).

B. Section 253 of the Act.

Section 253 ("Removal of Barriers to Entry") of the Act provides:

> (a) IN GENERAL. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively

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[12] Congress has preempted the regulation of "radio frequency emissions." This has been interpreted by the FCC to preempt states from regulating the placement of personal wireless facilities on the basis of the effects from radiation. Appendix 199-200 (para. 166-67). The FCC has concluded that it has no such oversight over broadcast facilities. *Id.*

> neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, *protect the public safety and welfare*, ensure the continued quality of telecommunications services, and *safeguard the rights of consumers.*
>
> * * *
>
> 28 U.S.C. § 253.

Pursuant to section 253(b), the State of Vermont (and by delegation the Town of Charlotte ZBA) may impose permit conditions in zoning permits in order to protect the public health, safety and welfare and safeguard the rights of consumers. In its decision, the ZBA included conditions relating to interference in order to protect its residents who are consumers who rely on devices such as computers, modems, fax machines, pagers, telephones, and the like for their livelihoods. Subsequently, those conditions were violated by WIZN, BANM, and CVFRS. Therefore, the ZBA may issue a Notice of Violation. This section is broad enough to cover all consumers, although we acknowledge 47 U.S.C. § 302a(a)(2) authorizes the FCC to regulate minimum performance standards for "home electronic equipment." The Conferees Report was intended to insure that states and local governments not adopt minimum performance standards that might be inconsistent with the FCC's standards. Nevertheless, the courts in *Great Lakes* and *Broyde* applied that language to all regulation of home electronic equipment, including nuisance claims. The courts have apparently applied the third prong of the *Cipillone* test (field preemption) to extend home standards to home nuisance complaints. It would be wrong to extend this authority to business

electronic equipment, where Congress has purposefully withheld authority from the FCC.

C. Permittees Are Jointly Liable.

Among Appellees there has been some hope that one or another of the three ought to be liberated from liability because they were not directly involved in the interference. That was the decision of the ZBA. Appendix 141.

Under Vermont law, "co-permittees are both responsible for complying with . . . permits and share fault for the violations." *Secretary, Vermont Agency of Natural Resources v. Handy Family, Enterprises, et al.*, 163 Vt. 476, 486, 660 A.2d 312, 315 (April 14, 1995). Since BANM, WIZN, and CVFRS are co-permitees at the Pease Mountain site, they are to some extent responsible for complying with permits and share fault equally for permit violations, regardless of which causes the interference. Therefore, the ZBA has the authority to issue a Notice of Violation to BANM, WIZN, and CVFRS collectively for any and all violations by each individually.

D. The Neighbors' Remedies Are Not Available at the FCC.

The Appellees argue that the Neighbors are not without a remedy. BANM has contended that the Neighbors merely need to bring their concerns to the FCC. But the FCC has not adopted regulations covering this issue. Although the FCC has adopted regulations to resolve complaints of interference those regulations do not cover matters such as those being considered here. The FCC

rules address permanently and correctly installed *receivers*, within what is called the "blanketed area" which is where the signal is particularly strong and interference is likely. In addressing FM broadcast station blanket interference the FCC has specifically excluded from its rules most consumer devices. See Affidavit of Mark Hutchins. Appendix 146, para. 8.

Section 73.318 provides in relevant part:

> (b) After January 1, 1985, permittees or licenses who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one year period. . . . Resolution of the complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

Moreover, the Neighbors are not aware of any rules that govern the susceptibility of business or institutional electronic equipment. Affidavit of Mark Hutchins, *supra*. There has been no showing of any conflict or "overlapping" with federal law. See *Head*, 374 U.S. at 432.

The Neighbors' concerns are properly before the state and local tribunals. If they cannot find relief there, they

cannot look to the FCC, since it has not promulgated any rules to deal with these issues.[13] Jurisdiction is not inconsistent with interstate commerce or FCC regulation. Meaningful, reasonable regulation will enhance, not defeat, this industry. The FCC is without jurisdiction here. If further proof is required, consider that the FCC has not stepped in and declared the actions of the ZBA preempted. See Section 253 of the Act which provides that if a "State of local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d) (preemption).[14]

The law is clear that State and local government can regulate the type of interference being addressed in this proceeding. If a telecommunications or broadcasting

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[13] This is not surprising, since the FCC has no statutory authority to do so.

[14] Sections (a) and (b) of this section provide:

"(a) In general.

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

"(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

facility believes it has been denied its rights it has an explicit avenue to address any alleged violations. See also 47 U.S.C. § 704(a)(7)(B)(v) (legal redress).

V. Fraud and Deceit Are Independent Causes of Action.

In dismissing the suit, the District Court declared that the Neighbors' claims of fraud and deceit "were not part of the proceeding from which they appealed, and are not properly before this Court." Appendix 360. This too is error. The Neighbors raised the issue of fraud, deceit, and misrepresentation during the May 1996 hearings before the ZBA. The ZBA failed to explicitly address this claim in its April 5, 1996, Notice of Decision (but see Appendix 143). The ZBA did find, however, that WIZN made representations during the pendency of its permit application in 1986 that there would not be any interference and if there was, WIZN would remedy it. Appendix 119. The ZBA found this to be "particularly disturbing" in light of the pervasive interference that WIZN could not *trap out* and the undeniable harm and expense to the citizens of Charlotte caused by the interference. The ZBA also noted that Contel made similar representations upon which the ZBA had relied.

Furthermore, a witness for the Neighbors, Mark Hutchins, testified during the May ZBA hearings that WIZN knew or should have known in 1986 that a 50,000 Watt radio broadcasting facility placed in close proximity to homes, businesses, churches, and schools, would cause substantial interference. He also testified that WIZN knew or should have known that it could not "trap it out"

as it suggested to the ZBA when seeking its 1986 permit. See Affidavit of Mark Hutchins. Appendix 146.

Based on BANM's and WIZN's misrepresentations to the ZBA, they were granted permits. The co-permittees were in a position to have superior knowledge in addressing the local zoning board regarding interference. The co-permittees gained an unfair advantage due to their misrepresentations. The ZBA was mistaken that it had no jurisdiction to address this violation of the public trust.

Courts have long deferred to states with respect to claims for fraud and deceit. *In re Long Distance Telecommunications Litigation*, 831 F. 2d 627, 633 (6th Cir. 1987). Fraud and deceit are not preempted by the Communications Act because they fall "within the conventional experience of judges" and "do not require agency expertise for their treatment." *Id.*

Vermont courts have traditionally reviewed fraud claims under two separate doctrines: actual fraud and constructive fraud. Actual fraud is typically defined as deceitful misrepresentation or concealment with evil intent. *Proctor Trust Co. v. Upper Valley Press*, 137 Vt. 346, 354, 405 A.2d 1221, 1225 (1979). Constructive fraud, in contrast, is mere wrongdoing without bad faith. *Id.* "Constructive fraud may occur where a wrongful act injures another but is done without bad faith or a malevolent purpose on the part of the perpetrator. It may be found in cases involving misrepresentations that do not rise to the level of deceit, or actual fraud, and in cases where a party in a position of superior knowledge or influence intentionally gains an unfair advantage at the expense of

another person." *Hardwick-Morrison v. Albertsson*, 158 Vt. 145, 150, 605 A.2d 529, 532 (1992).

Accordingly, based on fraud, deceit and/or material misrepresentations the ZBA may revoke WIZN's, BANM's, and CVFRS' permits, as an alternative basis to the Neighbors' position on the preemption argument.

VI. Conclusion

The Town of Charlotte is not preempted from exercising reasonable oversight and control over radio and cellular services that cause pervasive, harmful interference to the Town and its citizens. Congress never intended the FCC to regulate the interference of business and institutional electronic equipment. Congress only authorized the FCC to adopt performance standards for home electronic equipment. Any ambiguity reveals that the Conferees expressly limited the FCC's authority to home electronic equipment. WIZN and BANM have misled the Town, caused significant harm to it, its school, church, businesses and citizens. They cannot continue to pretend the avenue for recourse for the Neighbors is to file a complaint with the FCC when the FCC is neither authorized, nor has it adopted regulations covering these matters. The Town must exercise its authority reasonably and may allow reasonable accommodation to WIZN and BANM within the Town, but it need not become a backwater, second-class town to accommodate these two services.

For the foregoing reasons, the ZBA has the authority to issue the Notice of Violation to WIZN, BANM, and CVFRS. Accordingly, Appellees' motions to dismiss

should be denied and the case remanded to the ZBA for findings in accordance with this decision.[15]

Dated at Montpelier, Vermont, this 9th day of October, 1998.

APPELLANTS

BY: /s/ Gerald R. Tarrant
Gerald R. Tarrant, Esq.
P.O. Box 1440
Montpelier, Vermont 05601
Federal Bar ID #000381706

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[15] The ZBA may provide WIZN, BANM and CVFRS a reasonable time to locate and identify an alternative site and move their facilities from the existing location. If that site is within the Town of Charlotte, they should re-file within a reasonable time and demonstrate they will meet all reasonable concerns of the Town and State.

97-9141

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, Willaim Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter Coleman, Barbara Sanford Farrell, and William Pinney, Sr.	)
Plaintiffs-Appellants	)
vs.	)
Burlington Broadcasters, Inc. dba WIZN, Charlotte Fire & Rescue Services, Inc. and NYNEX Mobile Limited Partnership 1 dba Bell Atlantic NYNEX Mobile	)
Defendants-Appellees	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

APPELLANTS' REPLY BRIEF

Gerald R. Tarrant
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05602-1440
(802) 223-1112

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GRAEME AND MARY BETH FREEMAN, *et al.*, Appellants,	:	U.S. Appeals Court Docket No. 97-9141
v.	:	
BURLINGTON BROADCASTERS, Inc., *et al.*, Appellees.	:	

CERTIFICATE OF COMPLIANCE

Counsel for the appellants hereby certifies the following pursuant to F.R.A.P. Rule 32:

The reply brief I have filed on behalf of my clients is in compliance with amended F.R.A.P. 32. My brief uses a courier 14-point font, is under 650 lines and contains fewer than 7000 words. Specifically, my reply brief contains 4056 words and 370 lines.

Dated at Montpelier, Vermont, this 14th of January, 1999.

APPELLANTS

By: /s/ Gerald R. Tarrant

Gerald R. Tarrant, Esq.
Tarrant, Marks & Gillies
P.O. Box 1440
Montpelier, Vermont 05602
Federal Bar ID #000381706

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INTRODUCTION

Pursuant to Fed. R. App. P. 28(c) Appellant Neighbors submit this Reply Brief to address arguments presented by Burlington Broadcasters, Inc., d/b/a WIZN ("WIZN") and NYNEX Mobile Limited Partnership 1 d/b/a Bell Atlantic Mobile ("BAM"), as well as the Federal Communications Commission (the "FCC" or the "Commission"), as *amicus curiae*.

Summary

Congress has been careful and deliberate in carving out the Commission's jurisdictional authority over radio frequency interference (RFI). Congress has not granted the FCC complete and unfettered jurisdiction over the telecommunications industry.[1] Congress has taken an active role in directing the FCC to areas Congress

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[1] In 1982 the Conferees intended that "the Commission's authority apply only to 'home electronic equipment and systems' likely to be found in a private residence and intended for residential use, as distinguished from devices intended for office and business use." App. at 195. The reference in the Conferees Report to exclusive FCC jurisdiction over such interference refers to home electronic interference when the reference cited by the Appellees and *amicus curiae* is read in context to what Congress was doing when it elected to extend authority to the FCC on home electronic equipment and not extend it on business equipment. Appendix ("App.") at 195, 240 and 255.

believed the Commission should regulate focusing primarily on interference between stations and devices which are capable of emitting radio frequency radiation in sufficient degree to cause interference *to* radio communications. *See* e.g. 47 U.S.C. Sections 302a (a) (1) and 303(f).

The FCC has jurisdictional authority to promulgate regulations relating to interference between radio signals and according to some courts the FCC may have "implied" authority to regulate interference to *home* electronic equipment based on the authority to establish minimum performance standards for *home* electronic equipment contained in 47 U.S.C. Section 302a (a) (2). WIZN and the FCC agree the FCC does not have any authority to regulate interference to business electronic equipment. WIZN at 35 and FCC at 11.

To extend the limited statutory language contained in the Telecommunications Act ("Act") to areas withheld by Congress ignores not only Congress' intent as expressed in the Act, but ignores the rule that "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Keene Co. v. United States,* 508 U.S. 200, 212 (1993). To overcome this presumption applied to statutory construction and the further presumption against federal preemption (Neighbors at 18-19) this Court must find that the state or local law actually conflicts with federal law or that federal law preoccupies the field. *Id.*

A preemption analysis must focus on the facts. Preemption cannot be guided by broad statements about the "comprehensive nature" of federal regulation under the Act. WIZN at 13, BAM at 9-10, FCC at 4-5, and ARGUMENT at I and II, below.

WIZN fails to understand the implications of Congress' 1996 amendments to the Act. WIZN at 7-8. The FCC erroneously relies upon the 1996 amendments to the Act for the proposition that Congress did not intend to interfere with the FCC's centralized control over radio communications.[2] FCC at 15. Congress elected to preempt local authority over radiation emissions only with respect to "personal wireless facilities" and then only to the extent they comply with Commission regulations. 47 U.S.C. Section 332(c) (7) (iv).[3] In 1996 the FCC declined to preempt local regulation regarding the effects of radiation emissions by broadcasters. App. at 200.

Since there are no FCC rules governing the regulation of RFI to business electronic equipment there can be no irreconcilable conflict. Since Congress has gone to great

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[2] See App. at 181. Section 108 of S.652 (10/12/95) contained a provision preempting state and local control of facility siting. Similarly, Section 107 (a) (7) of the House bill, H. 1555, included preemptive language stating the FCC should adopt guidelines regulating the placement, construction, modification or operation of facilities if commercial mobile carriers. (H. 1555 at 5/3/95) App. At 189-90. The preemptive provisions were removed from the final version of the 1996 amendments.

[3] App. at 199-200. According to the FCC it was only addressing "one of the environmental factors" from radiation emissions and was not adopting regulations relative to RFI. App. at 196.

lengths to provide states and local governments with sufficient authority to regulate the siting of a telecommunications tower there cannot be any legitimate claim that the FCC occupies the field or that local siting of a tower will pose an obstacle to the federal scheme.

The Court must appreciate how limited and local the issue of radio frequency interference really is. RFI results from signal radiation (BAM at 2) and is confined to a limited area that is defined by the radiation pattern as it rapidly dissipates from the antenna. RFI results from too strong a signal being located too near a community or business. It is first and always a local siting issue.[4]

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[4] WIZN erroneously asserts that this case does not involve a "siting decision." WIZN at 7 and 30. It ignores that it obtained a zoning permit to site its tower on the representations that it would not impose any interference and if it did it would "trap it out." App. at 119. BAM's objections that representations made during hearings that are not explicitly incorporated into conditions in a permit are not binding is too narrow a reading of Vermont law. BAM at 3, n.3. BAM cannot complain that WIZN or BAM's predecessor did not have notice of the concerns or that it was unaware that it would be held to answer when the information appears in the permit itself. App. at 119, 121, 124. The Charlotte zoning board is a lay body and it is clear that the zoning board of adjustment relied on WIZN's representations regarding interference in reaching the conclusions about siting the tower. The Vermont Supreme Court has not been troubled by findings that are conclusions or conclusions that are really findings. The most important issue is whether the parties were aware of the facts. *Gramatan National Bank and Trust Company v. Pierce*, 121 Vt. 406, 413 (1960) ["While to a large extent these particular findings are conclusions, they are however sustained by facts previously found and supported by the evidence, and no clear error can be predicated thereon. (citations omitted)"] This matter was raised at the District Court and accepted by it

The FCC's claim that allowing local communities the power to site telecommunication antennas based on RFI concerns would also give towns authority to "order changes in the power or location of stations" or "change its technical operating parameters" doesn't just exaggerate the issue, it misdirects the Court. FCC at 11. Providers can calculate where they believe their signal can be safely sited. They do this to meet FCC guidelines on RFR and perhaps as the FCC contends on the basis of "good faith." *Id.* Either the FCC does not understand the authority surrounding the *siting* of a tower or it is prone to drastically overstating its case.

WIZN, BAM and the FCC have pointed this court to decisions that preempt states and localities in nuisance and zoning matters involving interference *between* stations and different transmitters and devices (such as radio and police transmitters) that are explicitly preempted under 47 U.S.C. Sections 302a (a)(1) and 303(f).[5]

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without any objection or cross-appeal by BAM or WIZN. There should be no dispute what WIZN represented to the Town in 1986 at this stage of the appeal.

[5] *See* also 47 U.S.C. Sections 301 (FCC grants licenses for radio communications and stations who shall not interfere with other stations); 303m(1)(E) (FCC has authority to suspend license of operator who willfully or maliciously interferes with other radio signal); 305(a) (radio stations belonging to U.S. government shall not interfere with radio stations and shall comply with FCC regulations); 306 (a signal of a foreign ship within the jurisdiction of the U.S. shall comply with FCC regulations to prevent interference); 320 (radio stations shall not interfere with the transmission or reception of distress signals of ships); 321 (ship radio stations may be adjusted to produce the maximum of radiation, irrespective of interference, which may

They point to decisions that involve interference of *home* electronic interference where courts have assumed FCC jurisdiction over this type of electronic equipment because Congress had authorized the Commission to establish minimum performance standards of home electronic equipment.

WIZN and BAM point to decisions that recite limited language from the 1982 Conferees Report that indicates that Congress intended the FCC to have exclusive jurisdiction over the type of interference it was discussing in its report – which was over *home* electronic equipment. They fail to explain that the courts which cite this congressional history were doing so with respect to interference between signals and home equipment. *See* WIZN at 18-19 and BAM at 8-9.

Without any factual support, the FCC joins WIZN[6] and BAM in alleging "chaos," "confusion" and

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be caused when ship is sending distress signals.); 323 (interference between government and commercial stations is regulated); 354 (b) and (c) (technical requirements of radio equipment on ships).

[6] WIZN objects to the reliance of the Neighbors on affidavits filed with the District Court. WIZN at 10. The zoning board hearings did not have a court reporter and no formal transcript was made. The purpose of affidavits was to add structure to the appeal. Moreover, the zoning administrator and the zoning board each found interference to business electronic equipment based on extensive testimony. App. at 16, 21-22. The District Court found interference based on the testimony presented below. WIZN and BAM agree that extensive testimony was taken and that at least WIZN continues to cause interference throughout the town. WIZN at 16-17; BAM at 4-5. The harm to the businesses, the school and the church is real.

"impossibility" in performing their duties if the Neighbors prevail. BAM claims that uniform quality of service would be impossible if the industry faced "inconsistent and conflicting technical standards." BAM at 10; FCC at 10. It is the hobgoblin at work. The FCC has not adopted any technical standards relative to interference *to* business electronic equipment as each meekly acknowledges in its brief. *See* e.g. FCC 11; also App. 207.[7]

ARGUMENT

Each form of "telecommunications" has different frequencies and power levels, different audiences and purposes but each also has at least one thing in common – a radiation signal. Radiation manifests itself in three ways – its creates the telecommunication signal; it is the cause for health concerns and it can cause electronic interference. BAM at 2; App. at 208. Congress has had knowledge of these phenomena and has acted to grant authority to the FCC where its oversight is necessary or appropriate. The authority it granted to the FCC over interference matters had been restricted almost exclusively to interference to radio communication signals. It was not until 1982 when Congress decided to expand the

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App. at 128-136, 146-147. These affidavits were before the District Court, and to the best of our knowledge and belief were accepted and relied upon by the Court. No cross-appeal of that issue was taken by WZIN or BAM.

[7] This is a reference to WIZN's engineer's report which acknowledges the very limited regulations that apply to interference over home electronic equipment under Rule 73.318. *See* App. 186-7 for the rule.

FCC authority to regulate the performance standards of home electronic equipment that courts began to extend that statutory authority to cover interference to all home electronic equipment. There is no statutory authority governing interference to business electronic interference and not surprisingly no regulations have been promulgated by the FCC to govern these matters. FCC at 11.

I. THE FEDERAL COMMUNICATION COMMISSION HAS ONLY THAT POWER WHICH CONGRESS HAS GRANTED TO IT.

BAM, WIZN and the FCC openly accept those enumerated powers governing interference explicitly granted by Congress and then assert additional powers not granted by Congress to the FCC on the basis that what wasn't granted to them must have been "implied." In doing so, they concede, as they must, that Congress did not authorize the FCC to regulate interference to business equipment. WIZN at 35.

The FCC discredits the authority contained in Section 302a (a) and falls back to its mantra that "allowing states and localities to regulate radio stations to eliminate interference with business devices would undermine the centralized federal control of radio that Congress had sought to achieve." FCC at 13. The FCC and BAM prefer the theory that the FCC has authority over all "technical" matters.

This is not a case where there is statutory silence on the issue of interference and the FCC has asserted jurisdiction because there was a need to fulfill its other statutory responsibilities. Congress has acted carefully and

deliberately and spoken both affirmatively and negatively with respect to regulating RFI. The Act was amended in 1982 to grant the FCC to make regulations governing the interference from devices emitting sufficient levels of radiation to cause harmful interference to radio communications and to regulate the establishment of minimum performance standards for home electronic equipment. 47 U.S.C. Section 302a (a) (1) and (2). Its enabling legislation vests the FCC with the power to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the [Act]." 47 U.S.C. Section 303(f). *See Southwestern Bell,* infra at 1225.[8]

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[8] The regulations cited by the court relate to interference between or to FCC licensed or controlled stations or to residential areas. For instance:

1. 47 C.F.R. Section 0.111 (e) concerns the Compliance or enforcement division of the FCC and relates to interference to "authorized communications."

2. 47 C.F.R. Section 0.131(h) relates to cellular communications and pertains to interference over other cellular services.

3. 47 C.F.R. Section 22.353 concerns public mobile services and regulates blanketing interference similar to 47 C.F.R. Section 73.318. In both instances, the licensees are not only responsible for certain limited types of home electronic devices. The FCC represents that this covers radios and televisions but it would appear to be more limited than that. See FCC at 11.

4. 47 C.F.R. Section 24.237 concerns personal communications services and again only relates to interference between stations.

The FCC refers to section 73.318 of federal regulations which is nothing more than a limited provision to protect a few home appliances. FCC at 11; *see* App. at 186-7. It prefers unfettered discretion.

Under our constitutional system, administrative agencies are subject to the same checks and balances that apply to the other branches of government. An agency must operate for the purposes and within the bounds authorized by its enabling legislation.

Government can exercise only the powers granted to it has been recognized by our courts since our earliest days. Chief Justice Marshall wrote:

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5. 47 C.F.R. Section 90.173(b) relates to assignment of frequencies and requires those licensees with assignments to cooperate to reduce interference among themselves. It provides licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements." Section 90 defines "harmful interference" in Section 90.7 as follows: "*Harmful Interference.* For the purposes of resolving conflicts between stations operating under this part, any emission, radiation, or induction which specifically degrades, obstructs, or interrupts the service provided by such stations."

6. 47 C.F.R. Section 90.403(e). This section also speaks of licensees taking precautions to avoid causing harmful interference which is defined in Section 90.7, above, to mean interference between stations.

7. 47 C.F.R. Section 73.318 is the blanketing interference rule for broadcasters. See FCC at 11; App. at 186-7. It is limited to certain "common" receivers in the home.

> The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it should seem too apparent to require enforcement by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

McCulloch v. State of Maryland, 17 U.S. 316, 4 L.Ed. 579, 4 Wheat. 316 (1819); *South Carolina v. U.S.*, 26 S.Ct. 110, 199 U.S. 448, 55 L. Ed. 261, 4 Ann. Cas. 737 (1905); see also *Marshall v. Gordon*, 243 U.S. 521, 537, 37 S.Ct. 448, 61 L. Ed. 881 (1917); *United States v. Lopez*, 514 U.S. 549, 565, 115 S.Ct. 1624, 1633, 131 L.Ed. 2d 626 (1995); *Brown v. North Carolina Division of Motor Vehicles*, 987 F. Supp. 451, 456 (1997).

Administrative agencies exercise only those powers granted them by the elected branches of government and those others powers reasonably ancillary to the effective performance of their statutory responsibilities. This is the very meaning of a democratic republic. It matters little whether the FCC or its regulated industry believe the statutory powers granted in a particular case are inadequate to do what the regulated providers of the service may feel justice or efficiency would dictate. Administrative agencies are as much bound by the law as are the courts and other instrumentalities of government. As the Court in *Lopez* concluded, quoting James Madison, "The powers delegated by the proposed Constitution to the

federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552, 115 S.Ct. at 1626, The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). The United States Supreme Court has characterized the "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[9] *Lopez*, 5145 U.S. at 552 quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

A. The FCC Has Traditionally Recognized Local Control.

The FCC has recognized the need to defer to local control over siting issues. It has found in the recent past that the Act does not preempt state or local control relating to environmental effects of radio frequency emissions from telecommunications facilities that do not fall within

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[9] Neighbors challenge the FCC's claim that the federal agency has the power to make "centralized" policy decisions that Charlotte businesses must accept interference to their business equipment. The FCC makes this claim without citing any statutory authority granting it such authority and is blind to the fact that simply moving an antenna (or siting it properly in the first instance) would remedy the problem. See FCC at 10 and 11. The FCC's reference to 47 U.S.C. 302a (a) (1) as support for its claim is not on point and does not grant the FCC authority to regulate non-radiating equipment or even those pieces of equipment that emit minor radiation or conduction. The purpose of that section is to regulate devices that may emit sufficient energy by radiation or conduction to cause harmful interference to radio communications.

the definition of "personal wireless facilities." App. at 199-200.

In 1996 the FCC addressed "one of the environmental factors" associated with radiation which focused on health impacts. App. 196. The FCC expressly limited its oversight to health impacts relative to personal services communications because of the limited statutory authority granted it by Congress. App. at 199-200.

In doing so, the FCC has explicitly found that it did not have exclusive jurisdiction over these technical matters but indicated if the industry "could prove" that local and state jurisdiction constituted an obstacle to the scheme of federal control of radio facilities that the industry would have to 1.) factually prove that factual allegation; and 2.) present the FCC with the legal basis which could justify FCC preemption. App. 200.

II. THE PREEMPTION INQUIRY MUST FOCUS ON THE PARTICULAR FACTS OF THE CASE.

The Appellees' arguments of "implied" authority, their generalities of FCC jurisdiction over all "technical matters" and their contentions that the FCC has "exclusive and plenary jurisdiction" all suffer from the same problem. Such generalities require more than mere assertions to overcome the *presumption* against preemption. In *Head v. New Mexico Bd. of Optometry*, 374 U.S. 424, 429-30, 83 S.Ct. 1759, 10 L.Ed. 2d 983 (1963) the court held that preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal

regulation under the Federal Communications Commission." The preemption inquiry must focus on the particular facts of the case. *Id.* at 40, 83 S.Ct. 1759; also *Southwestern Bell v. Board of County Commissioner*, 17 F. Supp. 2d 1221, 1224 (D.Kan. 1998).

In *Southwestern* the Town had concerns relating to its public safety communications being interfered with by the wireless telecommunications provider. A legitimate concern but one which is preempted under 47 U.S.C. Sections 303(f) and 302a (a) (1). *Head* and *Southwestern* reveal the distinctions that must be made when evaluating this area of the law.

III. THE COURTS HAVE NOT PREVIOUSLY ADDRESSED THIS ISSUE.

WIZN and BAM have listed a string of cases they believe confirm the intent of Congress to preempt the Town from enforcing its zoning permit. WIZN at 1320; BAM at 25. The FCC adopts many of the same cases. It is instructive to distinguish these holdings on their facts. (Below we follow BAM's format. BAM at 20).

United States Court of Appeals

1. *Broyde v. Gotham Tower, Inc.*, 13 F. 3d 994 (6th Cir. 1994), cert. denied, 511 U.S. 1128, 114 S. Ct. 2137, 128 L.Ed. 2d 866 (1994). WIZN and BAM claim *Broyde* stands for the proposition that FCC has "exclusive jurisdiction" over RFI. BAM at 20; WIZN at 13. This case was an action on nuisance in which residents alleged that the defendants' radio signals interfered

with the operation of home electronic equipment. It is not on point.

United States District Courts.

2. *Great Lakes Wireless Talking Machine Co., d/b/a WZSH 95 FM v. Hayes, et al.*, CIV-916140T (W.D.N.Y. June 25, 1991). BAM asserts *Great Lakes* stands for the proposition that all claims that would obstruct FCC's ability to regulate RFI are preempted. BAM at 20-1. WIZN claims the case is virtually identical to the instant case. It refers the Court to App. at 256-69. WIZN at 16. The complaint *in Great Lakes* was based on interference to home electronic equipment. App. at 257-8. The Court found that despite broad authority of local governments over their quality of life, *"where the Congress has enacted a statute which preempts a state or local law,* the state or local government is without the authority to act within that area. (citation omitted.)" (emphasis added.) *Id.* at 261. Again, the Court referred back to the 1982 Conferees Report which the Court correctly found "stated their intent in amending section 302 of the Act." *Id.* at 264. It quoted the same portion of the Conferees Report referenced in *Broyde,* supra. including the passage that "(t)he Conferees believe that radio transmitter operators should not be subject to fines . . . imposed by any local or state authority as a result of interference appearing in home quipment or systems. Rather, Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission."[10] *Id.*

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[10] Compare this last sentence with the earlier statements by the Conferees that the Commission's authority does not extend to business equipment. See App. 195. ("The Conferees intend that the Commission's authority apply only to home electronic

3. *Still v. Michaels*, 791 F.Supp. 248 (D.Ariz. 1992). Both WIZN and BAM argue that this case stands for federal preemption. BAM at 20-1; WIZN at 14. The homeowner was asking for an injunction on interference to home electronic equipment. *Still* at 249-50. The court gave preclusive effect to an earlier state court's ruling (See case # 9, below). *Id.* at 250-1. The court based its decision on two FCC administrative determinations (nos. 11 and 12, below) in which the FCC determined that it had exclusive jurisdiction over interference between two radio stations and the holding in *Blackburn* (no. 6, below) which have nothing to do with interference to either home or business equipment.

4. *In re Appeal of Graeme and Mary Beth Freeman, et al.*, 975 F. Supp. 570 (D.Vt. 1997). This is the decision from which this appeal was taken.

5. *Southwestern Bell Wireless, Inc. v. Board of County Comm'rs of Johnson County, Kansas*, 17 F. Supp. 2d 1221 (D. Kan. 1998). BAM states that not only does this case cite *Freeman* but it "specifically reject(s) contentions that 1996 amendments to 1934 Act alter FCC's exclusive jurisdiction over RFI." BAM at 21. WIZN acknowledges that this case holds that "interference of public safety communications are preempted by the Act. WIZN at 14. This case deals with claimed interference between two signals – the local public safety communication signals and the signals of a cellular company. *Southwestern* at 1222. *See* 47 U.S.C. Sections 303 (f) and 303 m (1) (E).

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equipment . . . as distinguished from devices intended for office and business use.")

State Courts.

6. *Blackburn v. Doubleday Broad. Co.*, 353 N.W. 2d 550 (Minn. 1984). BAM represents that this case stands for the proposition that "subject matter of RFI lies within FCC's exclusive jurisdiction." BAM at 21. WIZN acknowledges this decision deals with interference between radio station signals. WIZN at 15. The decision is based on statutory authority contained in 47 U.S.C. Section 303(f). *Blackburn* at 552.

7. *Helm v. Louisville Two-Way Radio Corp.*, 667 S.W.2d 691 (Ky. 1984). Both BAM and WIZN concede that this case stands for the proposition that states cannot regulate radio transmission over FCC signals. BAM at 21-2; WIZN at 15. WIZN claims that the police communication signals are really business electronic equipment. WIZN 23-4. Section 302a (a) (1). This decision is based on 47 U.S.C. Section 303(f).

8. *Smith v. Cavalry Educational Broadcasting Network*, 783 S.W. 2d 533 (Mo. App. 1990). This is the one case in which the introductory language to the decision refers to interference to equipment in homes and businesses. As previously discussed in Neighbors' Brief, except for its reliance on the *Blackburn* decision, the Missouri court failed to undertake a thorough analysis of the authorities or analyze the distinction between home and business equipment. Rather, the Court relies almost exclusively upon the 1984 Minnesota state decision in *Blackburn*, supra. Neighbors' at 30-2. Both WIZN and BAM characterize this case as precedent for the proposition that the FCC has exclusive jurisdiction over complaints of RFI to all electronic equipment. BAM at 22; WIZN at 15.

9. *Still v. Michaels*, 803 P.2d 124 (Ariz. Ct. App. 1990), review denied (Ariz. 1991). This is the state court's decision that ultimately found its way to federal

court and is listed as no. 3, above. Both BAM and WIZN claim this decision stands for the proposition that the FCC has exclusive jurisdiction over RFI. BAM at 22; WIZN at 14. The court held that an amateur radio operator's interference with *home* electronics was exclusively regulated by the FCC. *Still* relied on 47 U.S.C. Section 302a (a) (2). *Still*, at 125.

10. *Fetterman v. Green*, 455 Pa. Super. 639, 689 A. 2d 289 appeal denied, 695 A.2d 786 (Pa. 1997). Both BAM and WIZN claim that this decision upholds the federal preemption after the enactment of 1996 amendments to 1934 Act. BAM at 22; WIZN at 15. This is a case where one licensee brought an action against another licensee alleging interference by the other station. *Fetterman* involves the interpretation of 47 U.S.C. Section 333 (malicious interference with transmission) in which two competing radio stations collided with each other over the use of a particular channel. 47 U.S.C. Section 303(f).

FCC Administrative Rulings

11. *In the Matter of 960 Radio, Inc.*, 1985 FCC LEXIS 2342, at *78-85 (October 29, 1985.)[11] Both BAM and WIZN claim this decision stands for the proposition that the FCC has preempted local and state governments over RFI. BAM at 22; WIZN at 14, 19. WIZN acknowledges that this involves preemption over an attempt by a state to regulate two communication stations. This is an FCC decision that held that an

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[11] There were two different citations to this case. BAM refers to a decision dated October 29, 1985. WIZN refers to a decision of the same name dated November 4, 1985. It appears the two citations are to the same decision. The decision we reviewed was dated October 29, 1995.

Klamath Falls, Oregon permit regulating specific disputes between an FM and a TV station was void due to preemption. WIZN at 19-20. *See* FCC at 7.

12. *In the Matter of Mobilecomm of New York, Inc.*, 2 F.C.C.R. 5519 (1987). Both WIZN and BAM claim this decision stands for the proposition that the Act comprehensively regulates RFI and occupies that field. WIZN at 14; BAM at 22-3. The FCC in *Mobilecomm* ruled that the Town of Wilton, Connecticut's regulations of interference between FM radio stations was preempted by federal law. See FCC at 7.

In addition, BAM cites in a footnote *Winfield Village Cooperative v. Ruiz*, 537 N.E. 2d 331 (Ill. App.), appeal denied, 545 N.E.2d 135 (Ill. 1989). BAM at 21; FCC at 4. In *Winfield* an Illinois appellate court reversed the trial court and allowed a landlord to maintain a conviction action against tenant/amateur radio operator who caused interference to other tenants. The court held that the matter was a local matter, similar we submit to a local permit matter involving the Town of Charlotte. *Winfield* at 333.

In addition, WIZN cites the pre-1982 case *Schroeder v. Municipal Court of Los Cerritos Judicial District*, 73 Cal. App. 3d 841, 141 Cal. Rptr. 85, 87 (1978), appeal dismissed, 435 U.S. 990 (1978) for the proposition that "unquestionably, federal legislation has preempted local regulation of radio transmission, including assignment of frequencies, interference phenomena and the content of broadcast material." WIZN at 14-5. This is a correct, but limited, representation of that portion of *Schroeder. See Schroeder* at 846 citing *Allen B. Dumont Laboratories v. Carroll* (E.D. Pa. 1949) 86 Fed. Supp. 813, aff'd 184 F.2d 153, cert. denied 340 U.S. 929, 95 L.Ed. 670, 71 S.Ct. 490 (state censorship of television invalid); *United States v.*

Southwestern Cable Co., (1968), 392 U.S. 157, 20 L. Ed 2d 1001, 88 S.Ct. 1994 (cable television industry is under FCC regulation); and *Standard Television Co. v. Chronicle Pub. Co. (1960)*, 182 Ca. App. 2d 293, 6 Cal Rptr. 246 (allegations of "inferior signals" and conflicts between stations are regulated by FCC). It should be noted that *Schroeder* upheld local regulation of the height of a licensee's antenna. *Schroeder* at 848-9. The court found that an antenna at 40 feet would create interference 4,000 times stronger than as if the antenna were at 70 feet. *Id.* at 845.

IV. LOCAL SITING BASED ON RFI WOULD NOT CONFLICT WITH FCC REGULATIONS.

The FCC claims that local siting of towers would conflict with the federal regulatory scheme. FCC at 8-12. That scheme is based on a claim that Section 302a (a) (1) grants the FCC power to regulate "all of the devices at issue in this case."[12] The FCC doesn't explain itself further except to say that as a general condition of operation of these devices, they are subject to the condition "that interference must be accepted that may be caused by the operation of an authorized radio station, by another

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[12] Many pieces of business equipment such as dictation equipment, intercoms, audio and tape equipment, binding and laminating machines, calculators, clocks, date and time stampers, entry notification equipment, public address systems and audio headsets are not capable of emitting any radiation much less radiation sufficient to cause harmful interference to the FCC's regulated companies.

intentional or unintentional device. . . . or by an incidental radiator." FCC at 10. It then contends that it has made the judgment that public policy requires electronic "devices" must accept interference from radio stations. This policy must be compared with the authority actually granted to the FCC by section 302a (a) (1). That section authorizes the FCC to regulate devices which are capable of causing "harmful interference to radio communications." (emphasis added.) The FCC exaggerates its authority.

V. CONCLUSION.

The Neighbors respectfully request the Honorable Court reverse the District Court and remand this matter to the Vermont Environmental Court for it to remand it to the Charlotte Zoning Board with instructions that it has jurisdiction to enforce its zoning permit relating to interference matters affecting local businesses.

Dated at Montpelier, Vermont, this 14th day of January, 1999.

APPELLANTS

By: /s/ Gerald R. Tarrant
Gerald R. Tarrant, Esq.
P.O. Box 1440
Montpelier, VT 05601
Federal Bar I.D. #000381706

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FREEMAN	)	
	)	Docket No.
-vs-	)	97-9141
BURLINGTON BROADCASTERS,	)	
ET AL	)	
	)	
----------	)	

COURT HEARING

As recorded on October 15, 1999

-before-

THE HONORABLE JUDGE WALKER
THE HONORABLE JUDGE NEWMAN
THE HONORABLE JUDGE SOTOMAYOR

APPEARANCES:

GERALD TARRANT, ESQUIRE, representing the Appellants;

BRIAN SULLIVAN, ESQUIRE, representing Bell Atlantic, Mobile;

JOHN CAIN, ESQUIRE, representing Radio Station WIZN.

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

[2] OCTOBER 15, 1999

JUDGE WALKER: Freeman against Burlington Broadcasters.

MR. TARRANT: May it please the Court, my name is Gerald Tarrant and I represent the Appellants in this matter.

The appeal concerns severe interference at the local level in the Town of Charlotte, Vermont, and we are appealing a District Court decision which ruled against us on a motion claiming that there was no subject matter jurisdiction. Interference when properly understood is a local siting issue if it is raised properly and in a timely manner. The issue of interference affects local interests; it does not affect the spectrum, it does not affect the management or administration of the FCC's duties in the context of how –

JUDGE SOTOMAYOR: I'm not sure how that statement is accurate. The FCC is charged with figuring out ways of having transmitters not interfere, it's charged with insuring that transmitters are put up because we need them. Why is it a purely state court siting matter then?

MR. TARRANT: Because the analysis [3] must begin with the statutes. Once we understand that the concern by Congress and it is tracked in the regulations that that concern relates to interference between stations, between FCC services –

JUDGE SOTOMAYOR: The problem with your argument is that the legislative history is completely contrary to your position. I mean, I have looked at the legislative history on the very provisions you rely on, and Congress repeatedly says We are not interfering with the FCC's regulation of interference. They raised the issue of whether to pass a commercial device provision and

decided they don't need to do it. I mean, I don't know how I read that legislative history and come to the conclusion that your definition of what their intent was should govern.

MR. TARRANT: I'm not familiar with any reference to an FTC oversight, but the Conferees' Report, if that is what Your Honor is referring to, which is cited at the appendix page 242 and 252 does contain a statement that the FCC has exclusive jurisdiction over RFI, radio frequency interference. On page 242 of the appendix, it specifically says that that jurisdiction is [4] exclusive as referred to in this section, and that section refers only to home electronic equipment. Similarly, if you go to –

JUDGE SOTOMAYOR: I'm not sure – the fact that they chose to mention one receiving device which is the home device, and those are receivers, not transmitters, the fact that they chose to pass a provision with respect to that, how does that lead me to the conclusion that they were foregoing their broader statement in the House Conference Report saying that they expected the FCC to have jurisdiction over transmitters, which is what is at issue here?

MR. TARRANT: The authorization given to the FCC over interference relates to interference between stations, licensees, ships, government authorities, and so on. Those sections are stated in my reply brief. They are specific and they are discreet. When we go to the Conferees' Report, that is dealing with a discreet item that was added in 1982 because there mere complaints about interference to home electronic equipment. It is absolutely essential for this court to understand that Section

302(a) of U.S. Code 47 deals with two aspects that are an exception to the statutory [5] authority that has been delegated to the FCC. The first one deals with RF devices. Those are the type of device that emit radio frequency, and again Congress has come out to say they are concerned and they are delegating authority to the FCC only with respect to the RF devices that have sufficient energy to interfere with radio communications. Again they are only –

JUDGE SOTOMAYOR: This tower is not an RFI transmitter?

MR. TARRANT: It's a – It transmits three different types of services: One is a radio service, an FM radio service; one is a Bell Atlantic cellular service and another is a local service.

JUDGE SOTOMAYOR: Is it an RFI transmitter?

MR. TARRANT: Well, it does emit interference radiation, that's correct.

JUDGE WALKER: Then it's a transmitter.

MR. TARRANT: It's a transmitter.

JUDGE WALKER: I thought that the legislative history in 1982 also pointed out that the conference substitute is intended to clarify the reservation of exclusive jurisdiction to the Federal [6] Communications Commission, and I'm reading, "over matters involving RFI. Such matters shall not be regulated by local or state law nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint."

Why doesn't that language cover this situation?

MR. TARRANT: You are probably either referring to page 242 or 255 of the appendix. On page 255, I believe, maybe it's 254, there is explicit statement –

JUDGE WALKER: My reference is to the U.S. Code Annotated, 2277.

MR. TARRANT: Right. Well my reference that I have at this moment, Your Honor, is the Conferees' Report that we laid out in our appendix, and it specifically states –

JUDGE WALKER: What page is that?

MR. TARRANT: 250 –

JUDGE WALKER: Of the appendix?

MR. TARRANT: I believe it's 255.

JUDGE WALKER: Okay.

MR. TARRANT: It might be 254, and this is important.

JUDGE WALKER: Yes. That is the same [7] language.

MR. TARRANT: Okay. It's the same one. If you go to 254 –

JUDGE NEWMAN: Yeah. Where on that page? It's a pretty crowded page.

MR. TARRANT: 254. It's right in the middle of the page, beginning with the word "authority" and then it continues: "Acquisition is well within the technical

expertise of the Agency. The Conferees intend that the Commission's authority apply only to home electronic equipment and systems likely to be found in a private residence and intended for residential use as distinguished from a device intended for office and business use."

JUDGE WALKER: But aren't they referring essentially there to the equipment that – they are not talking about transmitters. Transmitters, exclusive jurisdiction over radio transmitters had been established earlier, and I think what a later section is saying is that nothing alters that. Are you arguing that somehow the FCC does not have jurisdiction over radio transmitters now, that somehow it's abrogated the long-term authority of the Federal Communications Commission over radio transmitters?

[8] MR. TARRANT: Not at all, except that you have to understand that what Congress and the FCC have been working for is to oversee the transmitters in, terms of the spectrum, to allocate the spectrum so that each transmitter would have a frequency and that they would not interfere with one another. If you look at the sections in my reply brief that are laid out in the U.S. Code, they specifically deal with interference in terms of interference between FCC services and licensees and governmental services and signals and licensees. There is nothing that speaks to interference to devices until you get to 302(a). When you get to 302(a) there are two sub parts that are critical to this analysis because they go then to the regulations. The regulations by the FCC follow 302(a), one – Sub (a)(1) deals with RF devices. Those are devices, sophisticated devices that have radio frequency emissions that

are capable of interfering with radio signals. That was the concern by Congress. Sub 2 is a second section but that doesn't deal specifically with interference; it deals with establishing standards for minimum performance of home electronic devices.

JUDGE SOTOMAYOR: Counsel, that is my [9] problem. Your argument doesn't make any sense. Subdivision (a) deals with the transmitters. The issue here is the siting of a transmitter. The Conference Report says very clearly we are going to deal with transmitters through the FCC. The (b) section, the home device is a receiver, not a transmitter. Whether that receiver is at home or in a business, (a) covers it because the issue has to do with the transmission of the interference, not with its receipt.

MR. TARRANT: I beg to differ. My understanding of 302(a)(1), if you read that and the reference to devices deals with the sophisticated electronic devices like computers and even televisions that operate with some radio frequency, either conduction or radiation, and it could either escape unintentionally and it might interfere with a radio signal. Those are the –

JUDGE SOTOMAYOR: Counsel, read (a). (a)(1) says "governing the interference potential, "the potential of devices which in their operation are capable of remitting radio frequency energy." The towers at issue here, are they or are they not devices which in their operation are capable of emitting radio frequency, yes or no?

[10] MR. TARRANT: They are not the type of devices we have heard in 302(a) and 302(a)(1). They are –

JUDGE SOTOMAYOR: Where in the language are they not that type of device? I mean, this is a very broad statement. Any devices which in their operation are capable of emitting radio frequency energy; answer my question of why this tower is not capable of emitting radio frequency energy.

MR. TARRANT: It is capable and it does. Every signal and – every signal has radiation coming out and it has three effects: The signal, the radiation, health concerns and interference, those are the three effects. What I'm saying in my argument is that Congress over the prior forty or fifty years has dealt with the devices, the transmitters, the signals. They are the transmitters that are covered in the sections that I point out on page 5 of my reply brief, And therefore Congress has always, as you read the cases, prior to 1982 found that it exclusively regulates interference between towers, between radio stations. Those they always refer to them as radio stations. You go back to the Blackburn case that is [11] cited. They don't have to wait for 302(a), they already have that authority under 47 USC. That authority is under Section 301 and 303. And it wasn't until 302 when home electronic devices and other kinds of devices that could emit, we were starting to see sophisticated home electronic devices, home electronic devices that could emit radio frequency energy. They were not towers, they were not radio stations or licensees, but the radiation could emit – could be emitted and it might theoretically interfere with a radio signal.

JUDGE SOTOMAYER: So they used home devices in (a)(2) but didn't use it at (a)(1). Don't we have

statutory principles that if Congress knows what it intends that it should use the same word in both?

MR. TARRANT: That's correct. That's correct.

JUDGE SOTOMAYOR: But it tends to limit (a)(1) to the type of devices that you are talking about, why didn't it say? They used broader language.

MR. TARRANT: Your Honor, remember that what it's speaking of in sub one is interference to radio signals. They are not talking [12] about interference to electronic devices. They are still concerned with interference to the radio signal; that is its ultimate and only responsibility in terms of administering the spectrum. They want to make sure that ham operators and taxicab drivers and oil dispatching companies do not interfere with radio signals, and those radio signals are all in some form or another regulated and overseen by the FCC. Its only when you get to (a)(2) that they talk about home electronic devices as opposed to business devices, and that is where you have to read page 254 of the appendix to understand that Congress explicitly states: "We do not want the FCC to meddle into business electronic equipment." They state that. And that is critical to our argument.

JUDGE WALKER: Okay. We have your argument. Your time is up and we'll hear the other side now.

MR. SULLIVAN: Thank you. Good morning, Your Honors. I'm Brian Sullivan, and I'm here on behalf of Bell Atlantic Mobile.

I think the Court's questions really basically are the central issue of this appeal, and that is when you look at

radio frequency interference it's absolutely crucial to distinguish between the [13] transmitter that causes the interference and the receiving device that experiences it. Once that distinction is made and understood, I think the very laborious process that the Appellants have gone through becomes unnecessary. The legislative history is entirely clear, the authority over transmitting devices has existed from the inception of the Federal Communications Act. In no way is Congress attempting to limit that aspect of the FCC's jurisdiction in 1982. Instead, after having identified a particular problem and a particular class of receiving devices that were susceptible to interference, Congress was broadening the jurisdiction of the FCC. So now in the wake of the 1982 amendments, the transmitters, such as the services that Mr. Tarrant referred to that operate from this tower, continue to be subject only to the FCC in terms of interference they emit. However, with those amendments, manufacturers of receiving devices now may also be subject to FCC jurisdiction if those are consumer devices. Yes, the Congressional committee that looked at this stated the reason for distinguishing in 1982 between the consumer and non-consumer was that the consumer devices which is not built to adequate RFI rejection [14] standards, and that is why they created that distinction. But in no way, in no way does that abrogate the authority that the FCC has always had with the transmitters. Congress said that exclusively in the passages that Your Honor is referring to. Indeed, the cases of which there are about 12 or 13 that we cited all come down the same way with the exception of that one wrongly decided case we cited. All of those courts, state, federal, trial courts, appeal courts

and FCC administrative decisions all focus in on that language, and despite the characterization of those decisions that the Appellants have made, most of those decisions don't involve interference between radio transmitters. Most of them involve the same types of interference complaints that we have in this case, that a radio station or other transmitter is interfering with a home or a business receiving device, That is what is at stake in this case; that is what has been decided in all those other cases. Because those cases are so clear, because the legislative history is so clear, I think at this point, Your Honors, I would just refer you to our briefs and thank you for your time.

JUDGE WALKER: Very well. Do we have [15] anybody else?

MR. CAIN: Good morning, Your Honor. My name is John Cain, I represent WIZN.

We ask the Court to affirm the judgment down below, and the issue before the Court is really whether federal law preempts state law when it comes to regulating RFI. Before we get too far afield, I'd like to point out to the Court what the matter concerns here. The Town of Charlotte is attempting to regulate RFI. They issued a zoning violation against WIZN, Bell Atlantic and Charlotte Fire and Rescue. That is what this matter is about. Every single time in the reported decisions that we briefed that that has been happened, the court has ruled that there is total preemption and only the Commission can regulate RFI. The entire situation started back, passing the Federal Communications Act of 1934, and they sought to make some order out of the chaos that was happening with FM

radio. Before the passage of the Federal Communications Act, FM radio broadcasters were broadcasting on any frequency they wanted, there was no regulation, there was a lot of interference. So when the Federal Communications Act came along, the decision was made to centralize authority over the technical [16] aspects of radio broadcasting. And it has been held with uniformity that local and state organizations could not regulate RFI because total preemption so that the Commission can regulate the technical aspects of radio broadcast, and that is why we ask this court to affirm the judgment.

JUDGE WALKER: Very well.

MR. TARRANT: Your Honors, I would like to take my two minutes just to respond to a few comments that were made by Mr. Sullivan and try to bring it back to Judge Sotomayor's earlier questioning. If you turn to the FCC's brief on page 10, they will themselves differentiate between the transmitter and the electronic devices, the devices that are being referred to in 302(a), (a)(1). They state the state and local assertion of authority will also conflict with FCC regulation of electronic devices by authority of 47 USC 302(a)(a), the FCC regulates any device that may emit RF radiation intentionally or not under an extensive set of rules known as Part 15. The list of devices covered by Part 15 includes virtually all modern electronic devices, including all of the devices at issue in this case. And then it then cites to Section 15.101 and 15.3. If this court takes the time to look at [17] those rules and then looks at the rule, the blanketing interference rules, you will see that the FCC defines devices as things such as tape recorders, phonographs and those kinds of phone devices. Business devices are not included. More

importantly, if you look at 73.318 of the Federal Rules, 73.318 sub (b), it talks about the new transmitter, owner of the transmitter having to satisfy complaints about interference to devices, and then it excludes a number of kinds of devices, and specifically it identifies mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers; phonographs are also excluded. Your Honors, the FCC knew it had no authority over regulating interference to non-RF devices. It doesn't have any authority to regulate interference over RF devices; it only has authority under 302(a)(1)(a)(1) to regulate interference from those sophisticated enough RF devices that could have radiation emitted to interfere with a radio signal from a transmitter, That is only – that is the only authority that they have. And if you study Part 15 and you look at 73.318 that I just referred to, you will come to the same conclusion. If you then go back to the Conferees' Report and the pages [18] I referred to, you will understand where Congress said, we do not delegate to the FCC authority of business. You will understand that everything is in sync, the FCC is in lock step, and until the Freeman case and until the FCC filed this brief, the FCC believed that also. If you then go back to the cases cited, you will see cases referring either to interference between stations or interference to home electronic equipment. The only case other than Freeman that even uses the word business is I believe the Smith-Calvary case that is cited in the briefs, and that only refers to the Blackburn case which is a case between interference between stations. It was not analyzed correctly. I hope you are going to take –

JUDGE NEWMAN: Your argument from the Conference Report is that we should read it to mean the FCC cannot regulate the tower that sends out any interference to a business device. Am I right so far? Is that your point?

MR. TARRANT: Well –

JUDGE NEWMAN: That the distinction between home and office is the dividing line and that this Commission can't regulate what this radio tower sends out?

[19] MR. TARRANT: No, it can regulate – Sorry, Your Honor.

JUDGE NEWMAN: Go ahead.

MR. TARRANT: It can regulate what goes out and it does regulate what goes out in terms of interfering between other FCC services, FCC licensees, ships on the high sea and government entities, and those are all spelled out on page 5 of our reply brief. What it cannot – what it has not authorized and what the FCC cannot oversee is interference to electronic devices. The only exception is –

JUDGE NEWMAN: But I'm wondering if the inference to be drawn from the Conference Report is to prevent the Commission from regulating the business device itself, trying to promulgate industry-wide standards for those business devices.

MR. TARRANT: You are correct, you're focusing on 302(a), (a)(2), and that is correct. But the other statement also is given with home versus business and with the statement about exclusive FCC jurisdiction over

RFI, it dealt only with home electronic standards. That was it. Now the extensive –

JUDGE NEWMAN: Standards for that [20] type of equipment, but that's not this case, is it?

MR. TARRANT: No, it's not, but what has happened is that the courts that have dealt with home electronic equipment have gone to 308(a)(2) and then they go to the Conferees' Report and they find that one sentence that says: "It is our intent that the FCC have exclusive jurisdiction over RFI sandwiched between the statements about home electronic equipment and that they don't have any jurisdiction over business equipment. And so they have taken that and said, therefore – and they used this in terms of nuisance cases and you can look at the Broyde case, for example, comes to mind, the Great Lakes case is another one, they cite that for the proposition that since the FCC had jurisdiction over promulgating standards and Congress intended that it have exclusive jurisdiction, the states should have jurisdiction over interference to home electronic equipment. But I want to go back to the authority in the statutes. The only authority that talks about devices is 302(a), (a)(1), and that specifically talks about RF devices with sufficient radiation capable of interfering with the radio transmitter.

JUDGE SOTOMAYOR: Why is it that this [21] tower – you still haven't answered that for me. – why doesn't that definition fit this tower?

MR. TARRANT: Well, if for no other reason that the FCC has defined what RF devices are and in the FCC brief, and again I would refer you to pages 10 and 11 of the FCC's brief, they specifically in Section 302(a)(a)

authorizes the FCC to regulate any devices that may emit RF radiation intentionally or not with an extensive set of rules know as Part 15, and the list of devices covered by that part includes all the modern electronic devices, including the devices at issue. The only place that they are wrong there is it doesn't include very simple calculators, clocks, tape machines, tape recorders. Those kinds of machines have been frozen in our town. They are not regulated. Moreover, this section as Part 15 acknowledges only refers and authorizes regulation from the device to the radio signal from the transmitter. It doesn't not authorize the interference from the transmitter to the device, so therefore when the FCC concludes on pages 10 and 11 that they have made a public policy that all of these kinds of devices must accept interference, they had no authority to make that policy decision. [22] Congress has that authority and Congress has not spoken, and Congress has been specific that there should be no regulation. In fact, there has been no regulation of devices except for one element – promulgating standards for minimum performance standards. No other authorization is contained in the Communications Act.

JUDGE WALKER: I thought that the problem in 1982 was the development of these new technologies such as CB radios and the like that were difficult to control from the transmission side and were causing RFI problems with devices in the home, and therefore, they would regulate the receivers at home, whatever would be receiving radio transmissions. And that is why Congress said in the report at the time it's become evident that many interference problems involving home electronic equipment and systems are not fully resolvable through taking

protective steps with the transmitting equipment, but the resolution of these interference problems, some of these interference problems may require action with regard to receivers and other electronic devices picking up unwanted signals. And then they passed 302(a), (a)(2), and then Congress said thereafter in connection with [23] that, "The conference substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulations as part of any effort to resolve an RFI complaint," the same language that I read before. And maybe I'm missing something, but it seemed to me that the FCC always had jurisdiction over transmitters; they are now exercising jurisdiction over some receivers because they are having trouble dealing with RFI through their transmitter regulating authority, and so they decided to focus on these home devices which were – and regulate from that perspective.

MR. TARRANT: Yes, and I'm not going to disagree with –

JUDGE WALKER: Are you quarreling with anything I have said about this?

MR. TARRANT: I'm not, Your Honor. I would like to clarify it, however. In terms of what Congress has authorized regulation, they have authorized regulation for the FCC to insure that transmitters do not interfere with other FCC [24] services. They have extended that to government signals and ship signals, but they have never talked about authorizing the federal government to the

FCC to regulate electronic devices. It wasn't until 1982 because of all of the complaints that they elected to address home electronic equipment, and they made sure with respect to that that there was no extension of authority to business electronic equipment.

JUDGE WALKER: I understand that. But their original jurisdiction over radio transmission from radio transmitters such as towers like this which they always had was not altered.

MR. TARRANT: That's right. And no one has ever required –

JUDGE NEWMAN: Your point is it doesn't go far enough. I wonder if there hasn't been a lot of confusion, and maybe it's only on my part so I won't speak (unclear) a lawyer –

JUDGE NEWMAN: All this argument about the Conference Report and the big distinction between business – what is the phrase? office and business use versus home – that really seems to me has nothing to do with your basic argument that the Commission's authority over radio transmitters [25] simply doesn't go as far as they say it goes.

MR. TARRANT: That's correct. That's correct.

JUDGE NEWMAN: This whole issue to develop a negative inference out of the distinction between business and home is, in my mind at least, is beside the point.

MR. TARRANT: It's beside the point. it only becomes a matter of importance because when you read the cases, a number of the states and even of the federal –

JUDGE NEWMAN: A number of the cases have been misled. But your point doesn't turn on that distinction. That distinction in the Conference Report, office and home equipment, I think you are saying, has to do with whether the Commission can regulate those bits of equipment. It can regulate the home equipment to be sure it is designed up to snuff so that it won't malfunction but the business apparently has its own set of standards so they didn't have to deal with that.

MR. TARRANT: That's correct.

JUDGE NEWMAN: So that is what they can do with the devices that are in the home or the office. Now the question is what can they do with [26] the radio transmitters? And you are saying they can do a lot of things with the radio transmitter. They can prevent it from interfering with other radio transmitters and all the other things you listed, but their radio transmitter authority doesn't go as far as to do what they did, what they are trying to bring up here. Is that your point?

MR. TARRANT: Yes. Yes.

JUDGE NEWMAN: And I'm not saying that I agree with you, I'm just trying to understand your point.

MR. TARRANT: And the only point on that is when you look at 302(a), (a)(1) when they do talk about RF devices, devices that emit radio frequency energy, they are still talking this time from the electronic devices emitting energy that could interfere with the transmitters, the signals and the services that they have always concerned themselves with. They have never concerned – Congress has never concerned itself with except under

302(a)(2) with standards or devices. Until 1982 it was limited. And therefore if you look at Part 15 and you look at the other section that I cited in terms of the blanketing interference, you will see that the FCC has stated that authority and [27] they do not regulate these matters, and the reason is they don't have authority.

JUDGE WALKER: All right. We'll reserve decision. Call the next case.

[28] CERTIFICATE

I, Carol A. Boone, Notary Public and Court Reporter, hereby certify that the foregoing pages, numbered 2 through 27 inclusive, are a true and accurate transcription to the best of my ability of an audiotape in the matter of FREEMAN, ET AL -v- BURLINGTON BROADCASTERS, ET AL, taken on the 15th day of October, 1999, at the United States Court of Appeals, Second Circuit.

I further certify that I am not related to counsel, counsel's law firm, nor any party to the case in this matter, nor do I have any interest in the outcome of the case.

/s/ Carol A. Boone
Carol A. Boone, Court Reporter

MOTION FILED
JUN 23 2000

(4)

NO. 99-1880

IN THE
Supreme Court of United States

GRAEME FREEMAN, *et al.*,
Petitioner,

v.

BURLINGTON BROADCASTERS, Inc., dba WIZN, *et al.*,
Respondent.

On Petition For a Writ Of Certiorari
To The United States Court of Appeals
For the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* JAMES M. JEFFORDS, PATRICK LEAHY AND BERNARD SANDERS, OF THE STATE OF VERMONT

SENATOR JAMES M JEFFORDS
Counsel of Record
SENATOR PATRICK LEAHY
United States Senate
Washington, D.C. 20510
(202) 224-3121
CONGRESSMAN BERNARD SANDERS
U.S. House of Representatives
Washington, D.C. 20515
(202) 225-4115

16pp

QUESTION PRESENTED

Is local zoning preempted by the Federal Communications Act and regulations promulgated by the Federal Commications Commission when radio or telecommunications facilities cause interference with local electrical and electronic devices used by local businesses and institutional services?

**MOTION OF JAMES M. JEFFORDS, *et al.*,
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

TO THE HONORABLE COURT:

COMES NOW, JAMES M. JEFFORDS, and files this Motion for Leave to File Brief as *Amici Curiae* on his behalf and that of other *Amici*.

JAMES M. JEFFORDS is a resident of Vermont who seeks to inform this Honorable Court of the impact this case has on the power of local Vermont officials acting under authority of state law to protect the health and safety of citizens of Vermont and to influence the placement of radio and telecommunications facilities within Vermont's borders.

Under Supreme Court Rule 37, the Vermont Congressional Delegation consisting of Senator Jeffords, Senator Leahy, and Congressman Sanders, as residents of Vermont, seek to present the interests of residents of Vermont in the exercise of local control over health, public safety and land use matters regarding land located in Vermont and regarding residents of the Town of Charlotte, Vermont. A decision in this matter would have significant national implications for thousands of communities throughout the Nation.

The following parties have consented to the filing of this brief *Amici Curiae*: Petitioners – Gerald R. Tarrant, Esq. representing petitioners; Graeme Freeman, Mary Beth Freeman, Frank Ittleman, Elaine Ittleman, Mike Fournier, Holly Fournier, Ellen Lane, William Pinney, Jr., Mark W. Bolles, Claudia Mucklow, Donna A. Wark, Iris Muggenthaler, James H. Squires, Lawrence Hamilton, Robert Carmody, Mark Musiel, Michael Yantachka, Lorie Gaboury, Chris McGee, Peter

Coleman, Barbara Sanford Farrell, and William Pinney, Sr.; Respondents – Brian J. Sullivan, Esq. representing NYNEX Mobile Limited Partnership 1 d/b/a Verizon Wireless, Robert E. Fletcher, Esq. representing the Town of Charlotte, and John P. Cain, Esq. representing Burlington Broadcasters d/b/a WIZN. The following has not responded – Thomas Heilmann, Esq.

JAMES M. JEFFORDS therefore moves this Court for leave to file a brief *Amici Curiae*, with Patrick Leahy and Bernard Sanders, and asks this Court to accept for filing the attached brief in support of the petition for Writ of Certiorari on this the 23th day of June, 2000.

Respectfully submitted,

James M. Jeffords,
United States Senator
United States Senate
Washington, D.C. 20510
Phone: (202) 224-3121
Fax: (202) 228-0776

Patrick Leahy,
United States Senator

Bernard Sanders,
Member of Congress

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BRIEF OF *AMICI CURIAE* JAMES M. JEFFORDS AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioners.[1]

INTEREST OF *AMICI CURIAE*

James M. Jeffords is a resident of Vermont and represents that state in the Senate of the United States of America, along with Senator Patrick Leahy. Congressman Bernard Sanders also represents Vermont as a resident and as a Member of the United States House of Representatives. The members of the Congressional delegation from Vermont are residents of Vermont and have an interest in the proper application of federal law in Vermont and thus seek to provide guidance in this matter as friends of this Honorable Court. The Charlotte Zoning Board of Adjustment notified respondents in a notice dated April 5, 1996, and set forth in Appendix I (Petition for Writ of Certiorari)[2], in part, that:

> The operation of the [tower] has caused long-term and continuous interference with electrical devices in homes and businesses through out the town. Transmission from this tower continue to interfere with devices including, but not limited to, telephones, answering ,stereos and tape machines, public address systems, televisions and VCRs, baby monitors, and computers and security systems. . . . [and] other stations on the FM dial."

[1]No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* contributed financially to the preparation of this brief.

[2]All future references to "Appendices" are references to the Appendices found in the Petition for Writ of Certiorari.

The above-quoted text demonstrates a significant problem in a Vermont community which local communities, such as Charlotte, Vermont, are able to address consistent with the United States Constitution, federal laws and federal regulations. We are lodging with this Honorable Court a Federal Communications Commission document published this month which articulates the important role that local communities have regarding the siting and uses of towers.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to urge the Court to grant the Petition for Writ of Certiorari. We respectfully urge that the Court of Appeals decision, affirming the decision of the District Court regarding the scope of federal preemptive authority regarding local authority over health and safety, and regarding local authority over land use, is not consistent with specific language set forth in the Federal Communications Act of 1934, as amended (FCA). We urge that federal law does not preempt state and local regulation of the siting and use of the radio tower in question under the facts set forth in this matter. There are specific federal statutes granting the Federal Communications Commission precise authority to regulate interference among licensed radio stations, radio operators, government stations and ships at sea but that explicit language does not imply, and should not be read to imply, that the Congress granted that authority in all other situations.

In general, *amici* urge that this issue is of great importance because of the dramatic increase in the siting, construction and use of telecommunications and radio towers in communities throughout the United States. The location of such towers near homes, schools, farms, churches, hospitals, airports, highways, and the whole host of work and home environments

is of great importance to the States, to local governments and citizens, and well as to the federal policy of enhancing access to communications. *Amici* urge that federal law establishes a balancing system within which States, and local governments, through the exercise of local health and safety powers, and certain powers over the use of land, have a significant role in the location, construction and use of these towers except in certain circumstances where Congress has specifically provided otherwise in a manner consistent with the United States Constitution. In this matter the respondents agreed to the conditions set by the local zoning authority such that the tower in question would not interfere with the operation of electronic devices in the town.

Amici further urge that federal law carefully delineates in many instances the respective roles of the federal government, the States, or the people.

More specifically, *amici* support the argument of petitioners that the town of Charlotte, Vermont, has the authority to require Burlington Broadcasters, d/b/a/ WIZN, and its co-permittees, to enforce a local permit to remedy the interference to local electrical and electronic devices used by local businesses and institutional services or be held in violation of its 1987 permit. They correctly argue that the town in question retains the authority to structure a reasonable solution, including the possible relocation of this tower or antennas, to provide for both radio and cellular telecommunication services as well as addressing community needs for the proper operation of electrical and electronic devices. Of course, the town's judgments in this regard are subject to judicial oversight.

This particular tower siting and use was approved by the town zoning board on the assurance and under the condition that interference with business and institutional electronic equipment would not occur, or would be rectified if it did occur where such interference with business and institutional electronic equipment continues to exist. District Court, Appendix C, pages 34a, at 38a through 39a. *Amici* urge that federal law, and the powers retained by the States, permit the town of Charlotte, Vermont, to enforce its reasonable conditions imposed on respondents and agreed to by respondent operator of the tower. District Court Opinion, Appendix C, at 37a and 38a.

ARGUMENT

I. Industry's Attempts to have Congress and the FCC Preempt Local Siting Authority Have Been Rejected.

In 1995 and 1996, the broadcast and wireless industries proposed bills to the Congress which would have granted broad preemptive authority to the FCC regarding the siting of broadcast and wireless facilities, including towers. Those proposals were expressly rejected by Congress in 1996 when Congress passed the Telecommunications Act of 1996 ("TCA 1996"). 110 Stat. 56 (1996), codified in scattered sections of 47 U.S.C.

While Congress did pass some preemptive language for mobile wireless facilities, it expressly rejected the broad sweeping language the industry proposed. The limited language that Congress did pass preempted towns and localities from regulating "the placement, construction and modification of personal wireless facilities on the basis of the environmental effects of radio

frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such regulations." 47 U.S.C. § 332(c)(7)(B)(iv). (Emphasis added.)[3] Congress rejected attempts to preempt local government authority over the siting of radio broadcast towers and other facilities.

No provision similar to section 332(c)(7), regarding personal wireless service, can be found in the Communications Act of 1934, as amended, regarding the siting of radio broadcast towers.

After enactment of the TCA 1996, members of Congress have seen additional unsuccessful attempts by the broadcast and telecommunications industry to preempt local and state authority to regulate the siting of towers and to preempt the general police powers our communities have enjoyed for the past 65 years over the siting of telecommunications facilities.

Local governments continue to have significant authority over the siting of radio broadcast towers and the case law certainly

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[3]With respect to "mobile services" Congress also enacted in 47 U.S.C. 332(c)(7) provisions protecting local and state authority over the "placement, construction, and modification of personal wireless service facilities," but prohibited local and state governments from discriminating among providers and from prohibiting "the provision of personal wireless service" among other requirements for personal wireless service. See, Appendix N, pages 120a though 122a, of the Petition for Writ of Certiorari filed in this matter.

supports the FCC position.[4] Indeed, even with respect to mobile telecommunications towers where Congress has granted the FCC some preemptive authority, as just discussed, it is clear that local governments also retain a great deal of authority over the siting of those towers. *AT&T Wireless PCS, Inc. v. City of Virginia Beach,* 155 F. 3d 423 (4th Cir. 1998). The decisive opinion in *AT&T Wireless PCS* applies with much greater force to radio broadcast towers since Congress has not attempted to preempt local siting authority for such towers. Indeed, the Tenth Amendment to the United States Constitution in part provides that powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people . . ."

Local control over some aspects of telecommunications facilities has been reinforced this month in an FCC publication produced to help local planners determine what are appropriate siting policies. This guide is called "A Local Government Official's Guide to Transmitting Antennae RF Emission Safety: Rules, Procedures, Practical Guidance," ("Local Guide") and is dated June 2, 2000. The opening page of this guide was transmitted by William E. Kennard, Chairman, Federal Communications Commission, and Kenneth S. Fellman, Chair, Local and State Government Advisory Committee.

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[4]In 1996, shortly after Congress passed the TCA 1996, the FCC did not adopt a request from the broadcast industry that the Commission preempt state and local communities over the placement, construction and modification of broadcast facilities on the basis of the health effects from radiation. The FCC, in part, noted:

> 167. The Telecommunications Act does not preempt state or local regulations relating to RF emissions of broadcast facilities or other facilities that do not fall within the definition of personal wireless facilities. FCC 96-326, Appendix Y, pages 181a and 182a.

The guide, written by the FCC's "Local and State Government Advisory Committee" includes the following language[5] regarding the FCC's own interpretation of the 1996 Telecommunications Act:

> [This document] does not address other issues such as construction, siting, permits, inspection, zoning, environmental review, and placement of antenna facilities within communities. Such issues fall generally under the jurisdiction of states and local governments, within the limits imposed for personal wireless service facilities by Section 332(c)(7) of the Communications Act .... Section 332(c)(7) generally preserves state and local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities, subject to specific limitations set forth in Section 332(c)(7). Among other things, Section 332(c)(7) provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."

The guide's authors further explain that state and local governments and the FCC may "differ regarding the extent of state and local legal authority under Section 332(c)(7) and other pro-

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[5]Footnote numbers from the original document are omitted. We will lodge the full text of this document with the Clerk of this Honorable Court.

visions of law.... Rather than address these legal questions, this document recognizes that, as a practical matter, state and local governments have a role to play in ensuring compliance with the FCC's limits . . ."

This is the clearest language to date from the FCC explaining the rights of local and state governments to regulate telecommunication facilities in their communities and reinforces the arguments being made by the petitioners from Charlotte.

II. Industry Reliance on Local Control.

For decades the industry has relied on landowners and local communities to accept radio towers. Radio towers have been constructed on private land with the approval of, and under conditions set by, local town zoning boards. This system protects homeowners, controls aesthetic blight, allows communities to use their police powers, and promotes planned community growth while protecting private investment in radio broadcast facilities which in turn can benefit communities rather than "impair" them as the Charlotte Zoning Board of Adjustment found had occurred in this matter. District Court Opinion, Appendix C, at 38a and 39a.[6] Indeed, the FCC Local Guide published this month and discussed earlier, describes such a system of local and federal partnership.

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[6]Indeed, the case law on preemption regarding the FCC "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation . . . ." *Head v. New Mexico Board of Optometry*, 374 U.S. 424, 429-30 (1963). Also see, notes 2 and 3.

III. Limits on FCC Authority.

The FCC is authorized to regulate the telecommunications industry and ensure that telecommunications signals and other devices do not interfere with radio communications. However, Congress has not granted the FCC unlimited powers. First, section 302a(a)(1) states in pertinent part:

> (a) The Commission may, consistent with the public interest, convenience and necessity make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, orother means in sufficient degree to cause harmful interference to radio communications.

That section provides the FCC with the authority to regulate devices that create spurious signals in sufficient degree to interfere *with a radio station or other communication signal.* It does not provide, on its face, authority for the FCC to promulgate rules to regulate the machinery of our local businesses and institutions.

Indeed, federal and local regulatory approaches can coexist and pursue different objectives allowing for local adjustments for local health, safety and land use reasons. *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983).

Finally, it is Congress that promulgates broad policies on who must accept interference and sets the rules for the FCC to follow. In the past, Congress has been concerned that signals and devices might have sufficient strength to interfere with other

radio communications. 47 U.S.C. §§ 302a(a)(1) and 303(f). Congress has very artfully and at times very gingerly granted the FCC authority over radio frequency interference.

It has not granted the FCC exhaustive authority in this area. Congress has been deliberate, not extravagant, in delegating to the FCC authority in these matters. The authority to make broad public policy decisions remains with Congress not the FCC. Moreover, reasonable local and state review of siting issues including local interference issues does not have any measurable impact on the federal scheme.

CONCLUSION

For the foregoing reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certioriari.

Respectfully Submitted,

JAMES M. JEFFORDS
United States Senator
United States Senate
Washington, D.C. 20510
202 224-3121